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Supreme Court of the United States

OCTOBER 1955 TERM

No. 261 MISC.

LEONARDO SALEMI,

Petitioner,

against

STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

	PAGE
(a) The Opinions Below	1
(b) Statement of Grounds of Jurisdiction	2
(c) Questions Presented for Review	2
(d) Statutes and Regulations Involved	3
(e) Statement of the Case	3
(f) How the Federal Issue Was Raised	12
(g) The Reasons Relied on for the Issuance of the Writ	12
Conclusion	18
Appendix A:	
Court of General Sessions Opinion	19
Court of Appeals Opinions	20
Appendix B:	
Extracts from Record with Regard to Janson	51
Appendix C:	
Extract from Affidavit of Patsy Yannotti, Sworn to March 15, 1955	55
Appendix D:	
Extracts from 1955 Hearing	57
Appendix E:	
Extract from Coram Nobis Petition (Dec. 6, 1954)	60
Extract from Notice of Appeal (Feb. 7, 1955)	60

PAGE

Extract from Affidavit of Jacob Shientag, Sworn to March 21, 1955, Used in Support of Motion for New Trial Dated March 21, 1955 61

Extract from Minutes of April 18, 1955 61

Extract from Affidavit of Jacob Shientag, Sworn to May 18, 1955, Used on Motion for Reargument May 18, 1955 64

TABLE OF CASES CITED

Betts v. Brady, 316 U. S. 455 13

Brown v. Allen, 344 U. S. 443 18

Frisbie v. Collins, 342 U. S. 519 18

Hawk, Ex parte, 331 U. S. 114 18

Hogan, Matter of, v. New York Supreme Court, 295 N. Y. 92 18

Leyra v. Denno, 347 U. S. 556 18

Leyra v. New York, 345 U. S. 918 18

Lyons, Matter of, v. Goldstein, 290 N. Y. 19 18

Malinski v. New York, 324 U. S. 416 13

Mooney v. Holohan, 294 U. S. 103 ..... 15, 18

Palko v. Connecticut, 302 U. S. 319 13

Patterson v. Alabama, 294 U. S. 600 13

Powell v. Alabama, 287 U. S. 45 13

Pyle v. Kansas, 317 U. S. 213 15

Rochin v. California, 342 U. S. 165 13

Smith v. Baldi, 344 U. S. 561 14

PAGE

Snyder v. Massachusetts, 291 U. S. 97 17

United States v. Hayman, 342 U. S. 205 17

Williams v. Georgia, 349 U. S. 375 13

STATUTES CITED

Code of Criminal Procedure:

Section 465, Subd. 7 ..... 11, 17

Section 528 11

28 U. S. C. Section 1257(3) 2

U. S. Constitution, Fourteenth Amendment 12

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York which, on reargument, affirmed, by a vote of four to three, a judgment of the Court of General Sessions of the City of New York convicting petitioner of murder in the first degree and which affirmed that court's denial of a motion for a new trial.

(a) The Opinions Below

The opinions of the Court of Appeals are reported in 309 N. Y. 208. Copies thereof, as well as of the opinion of Judge Goldstein of the Court of General Sessions are hereto annexed as Appendix A (pp. 19-51, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered on July 8, 1955, and is final.

2. No application for rehearing was made.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 USC § 1257(3).

(c) Questions Presented for Review

1. Can a conviction of murder in the first degree be sustained where the only witness who identified the defendant as the killer was committed as insane immediately after the jury's verdict?

2. Can a conviction of murder in the first degree be sustained where the facts with reference to the mental health of the only witness who identified the defendant as the killer were known to the prosecution and were not disclosed to the defense?

3. Can a conviction of murder in the first degree be sustained where proof of a dying declaration implicating the defendant was adduced before the jury and after its verdict credible evidence was produced to the effect that the condition of the slain man was such that no dying declaration could have been made by him?

4. Can a conviction of murder in the first degree be sustained where proof of a dying declaration implicating the defendant was adduced before the jury and after its verdict credible evidence was produced that the witness had not been with decedent at the time he claimed such declaration was made?

5. Can a state court, under the circumstances related in the preceding questions, deny all relief to a man condemned to die?

6. Is it a denial of due process for a court on a motion for a new trial to conduct an extended examination of the body of the deceased and to question witnesses in the absence of counsel for petitioner?

(d) Statutes and Regulations Involved

None.

(e) Statement of the Case

a. Petitioner was charged with the murder of one Walter Forlenza by shooting (fol. 8)* The shooting occurred in the early evening of February 26, 1952 in a restaurant while decedent was sitting at a table alone (fols. 194-201). Decedent died on the following day on the operating table (fol. 833). No motive for the killing was established. Petitioner was placed at the scene by two witnesses, but one of these, a part owner of the restaurant, Bertorelli, merely testified that petitioner had been there a few minutes before the shooting (fols. 186-189). The other, Janson, testified that petitioner stood over deceased with a gun in his hand (fols. 307-313). Janson claimed he had seen petitioner before, the last time about a year or so earlier (fol. 383). When first questioned by the police and the District Attorney he said that he recognized petitioner as a man he had seen at the bar, but not at the time of the shooting (fols. 545, 546). He had lied then, he said, because he had been afraid (fols. 627-632).

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*Folio references are to the printed record in the Court of Appeals on file in this Court in connection with No. 45 Misc., 1954 Term.

At the time Janson testified he was being held in prison as a material witness (fols. 325, 626). Two days before he had run into some bars, inflicting a scalp wound (fols. 326, 481-483). This was a suicide attempt (fol. 2018). The prosecution knew this before Janson testified (fols. 2266, 2267). That was not then disclosed to the defense (fols. 2874-2877). After the verdict was rendered Janson was, at the suggestion of the prosecutor's physician, sent to Bellevue, pronounced "psychotic" and committed for treatment to a hospital for the insane (fols. 1818-1842). The hospital records were attached to the motion papers for a new trial made in 1953 (fols. 1936-2019).

Thereafter a hearing was held at which petitioner sought to establish that Janson was insane when he testified (fols. 2022-4109). At that hearing it was, for the first time, learned by the defense that, while the trial was still in progress Janson had stopped eating and talking and that the prosecutor was so advised (fols. 2240-2244). But it was not until after the jury's verdict that Janson was taken to see a doctor (fols. 2244, 2245). Pertinent extracts from the testimony and documents are set forth in Appendix B (pp. 51-55, *infra*).

Judge Goldstein ruled that Janson was sane (fol. 4124). That determination was reviewed by the Court of Appeals together with the original conviction and affirmed without opinion (three judges dissenting on the ground that the Court's charge had been inadequate) (306 N. Y. 863). This Court denied certiorari (348 U. S. 845) and rehearing (348 U. S. 890).

b. At the trial the prosecution also offered the testimony of a brother of deceased, James, to the effect that between 5 and 5:30 P. M. on the day he died deceased had named petitioner as his assailant (fols. 679-684). No reference had been made to that testimony in the prosecutor's opening statement (see fols. 91-96) and it came as a com-

plete surprise to the defense. James had never mentioned this, he said, until May (fol. 702).

Subsequent to the trial petitioner ascertained for the first time, by unimpeached testimony of disinterested persons, that the physical condition of decedent at that time was such that he could not have made the dying declaration so testified to and that no one was with him at the time indicated other than the hospital personnel.

At first petitioner sought redress with respect to both these matters by an application for writ coram nobis. That was dismissed by Judge Goldstein and the dismissal affirmed by the Court of Appeals but without prejudice to the presentation of the issue with respect to the dying declaration by motion for a new trial (308 N. Y. 863). Such a motion was promptly made, claiming that a conviction obtained under the circumstances disclosed constituted a denial of petitioner's right to due process under the Fourteenth Amendment to the United States Constitution.

The motion rested on affidavits by two new witnesses—Dr. Strully, who had attended Walter at the hospital, and Patsy Yannotti, who had visited him there just before he was taken to the operating room. The Yannotti affidavit excludes the possibility that James was there, as he claimed he was. Extracts from that affidavit are set forth in Exhibit C (pp. 55, 56, *infra*). A hearing was held before Judge Goldstein.

At that hearing these two affiants and other persons gave their versions of what occurred at the hospital in the hours preceding the removal of Walter to the operating room. To do justice to the cross currents of emotion and motivation disclosed by this testimony would call for the pen of a Dorothy Sayres. With all deference, we submit that the recital in the majority opinion (aside from its occasional inaccuracies) falls far short of an adequate picture. In all humility we shall try our hand at giving it.

It must be borne in mind that at the trial the prosecution sought to prove that Walter had told his brother James between 5 and 5:30 P. M. (fol. 691)—that is, just before he was removed for the operation—that petitioner had shot him. The defense sought there to show that Walter, when asked by his mistress, Evelyn, had said he did not know who had done it (fols. 1358, 1359). Then, in rebuttal, the prosecution put James' wife, Maud, on the stand. She testified that, before Walter had died, Evelyn had told her that Walter had accused petitioner (fols. 1393-1395). Evelyn had denied this (fols. 1364-1365).

Now, at the motion hearing, petitioner sought to establish two things—that James was not at the hospital when he said he was there; that Walter was in no physical condition to have made any declaration.

Petitioner established the first of these positions by the testimony of wholly disinterested, unimpeachable witnesses. The special nurse, Mrs. Cancro, hired to look after Walter, testified that no man had come to see him after she returned from lunch around 1:30 (SM. pp. 132, 154),* although there were two men there at that time (fol. 127). The policeman, Snyder, assigned to guard Walter and who came on duty at 4 P. M. (SM. pp. 463, 465), Dr. Strully (SM. p. 200) and Patsy Yannotti (SM. pp. 83-85) all eliminated James as having been there. Even Evelyn, who at the hearing testified for the state and repudiated her trial testimony, said that James had not been at the hospital in the afternoon (SM. pp. 663, 714, 750). And Donato corroborated her (SM. pp. 817, 827, 852). Only James' sister Jeanne and his wife Maud (SM pp. 374, 421, 512-514) corroborated him. And their testimony fixes the time at 5 to 5:30 P. M. so that it could not have been James who was one of the two men seen by Mrs. Cancro when she returned from lunch.†

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* These references are to the typewritten minutes of the hearing held in 1955.

† Besides, no one ever claimed that James was accompanied on his visit by another man.

The testimony on the other phase of the case came from the same nurse and the two physicians in attendance, Drs. Strully and Breidenbach. They described their patient's condition in detail and expressed the opinion that he was not physically able to talk, that he was able only to express himself by grunts and motions of the head (S.M. pp. 183-197, 285, 288, 294, 295). Dr. Strully himself had asked Walter whether he knew who had shot him and he had indicated, by the motion of his head, that he did not know (S.M. pp. 194, 258). Each expressly stated that the conversation testified to by James could not have taken place (S.M. pp. 201-204, 297, 298, 300). Excerpts from their testimony are annexed as Appendix D (pp. 57-60, *infra*).

The prosecution sought to counter their testimony by that of Evelyn, James' wife Maud, his sisters and one Tony Donato, also known by the picturesque names of Iodine or Big Poison. The sister and Maud simply testified that Walter had been able to talk at various times of the day (S.M. pp. 370, 371, 427, 428, 501-508). Evelyn and Tony each claimed that Walter had accused petitioner to them.

Evelyn's story was that Walter had accused petitioner early in the day with the injunction that she should not reveal it unless he died and then only to James (S.M. pp. 552-554). She said she had obeyed this injunction. (This contradicted Maud's testimony at the trial (fols. 1393-1395).) But she admitted that when asked by the District Attorney, the police and later by a relative and girl friend of petitioner, she said that Walter had been unable to identify his assailant (S.M. pp. 563-565). Those statements, as well as her trial testimony, she now claimed were false and had been motivated by fear (S.M. pp. 561-562)—although she conceded that no one had threatened her (S.M. pp. 605, 608). The new version first was developed several years later in a conversation with the Assistant District Attorney who had tried the case in the course of an interview

prompted by the seizure of some quinine in Evelyn's apartment and her being questioned about an unidentified homicide case (S. M. pp. 567-574, 586-589). In the meantime she had become Donato's mistress (S.M. pp. 575-578).

Donato himself had a long criminal record, was serving a prison sentence for possession of drugs at the time of the hearing and was awaiting sentence on another offense (S.M. pp. 723-725). He claimed that he had visited Walter around 10:30 A. M. with another man (S.M. pp. 732, 733) when the statement was made. Why Walter should have confided in Donato was never made clear. And Walter's widow, Mary, testified that Donato had told her Walter could not talk (S.M. p. 1106).

Donato also testified that in the Tombs petitioner had admitted the crime and given a motive for it (S.M. pp. 736-738). But the story so told is at variance with the testimony of all the other witnesses as to the circumstances surrounding the shooting (cf. fols. 187, 195-197, 300-307). Moreover, it is inherently incredible that petitioner, at the very time he was trying to get a new trial, should have admitted the crime.

During the course of the hearing Judge Goldstein indicated that he wanted to have the body of the deceased exhumed in order to determine whether or not certain teeth were missing as the hospital records seemed to indicate (S.M. 923-925). The court's statement indicated that this was related only to "the teeth of the deceased" (S.M. p. 924). On that basis counsel for petitioner agreed and it was arranged that they would have a physician attending. The physician chosen was Dr. Milton Birnkrant, who had taken X-ray pictures at the hospital. When the time came for the examination of the body the Court attended with the physicians; counsel for both sides remained outside (S.M. pp. 982, 986, 991). In the absence of counsel and without their knowledge the Court, instead of merely examining the body to ascertain the condition of the teeth,

had a complete new autopsy made, placed a witness under oath, and questioned petitioner's medical representative (S.M. pp. 952-964). As soon as counsel learned of this they objected, claiming that this constituted a denial of petitioner's rights under the Fourteenth Amendment (S.M. pp. 971-982). Extracts from that statement are set forth in Appendix E (pp. 61-64, *infra*).

Judge Goldstein held (see Appendix pp. 19-25, *infra*) that the evidence produced on the motion with regard to James' presence at the hospital was merely cumulative. He rejected the testimony of the physicians adduced by petitioner because he believed that their opinions were based on statements contained in the hospital records and not borne out by the examination of Walter's body.

After Judge Goldstein denied the motion for a new trial defense counsel were informed by the Catholic Chaplain of Sing Sing that another inmate, one Clark, formerly Colbert, had made a statement accusing Donato of perjury (Cl. S.M. pp. 1-4).* The hearing was then reopened and Clark called (Cl. S.M. p. 7). He testified that when he had met Donato at Sing Sing Donato had talked about petitioner's case, claimed that petitioner was innocent, that the story about a dying declaration was false and that he, Donato, would help petitioner to get a new trial. Clark, having seen an account in a newspaper of the testimony Donato had actually given, was astonished and went to the Chaplain with his story (Cl. S.M. pp. 22-26). Donato denied that he had ever talked with Clark about the case at all (Cl. S.M. p. 77). Clark had said that part of this talk had been in the presence of another prisoner, Jennings (Cl. S.M. p. 23), but the latter was not called. The defense put Donato's mother, Maria, on the stand. She testified that her son had told her before Walter died that he had not been able to talk (Cl. S.M. pp. 115-125). Thereupon

*The pagination of this hearing starts anew.

Judge Goldstein adhered to his position, without further opinion (Cl. S.M. p. 143).

c. Direct review of the denial of the motion by the New York Court of Appeals was accomplished by the device of an application to that court for reargument of its original decision affirming the conviction. Such reargument was granted, with the result that the Court of Appeals was able to test the new matter "as if it had originally been a part of the main record" (309 N. Y. at 210). Judge Dye, for the majority, reviewed petitioner's contentions on the merits, rejected them and concluded that petitioner had been "accorded due process." Judge Dye disposed of the first issue by stating that on the original appeal the Court had unanimously agreed with Judge Goldstein's finding that Janson was competent to testify. As to the second, he concluded that the evidence produced at the hearing with respect to the dying declaration was not "newly discovered" because the names of the witnesses appeared on the hospital records.* He stated also that the claim that decedent could not talk was inconsistent with the position taken by the defense at the trial. Judges Fuld, Desmond and Van Voorhees dissented, all concurring in two separate opinions.

Judge Fuld expressed the view that a refusal to direct a new trial would not only be unjust to petitioner but "would do a disservice to the administration of the criminal law." His conclusion is all the more noteworthy since he was part of the original majority.† He said that the proof not before the jury demonstrated that Janson had been insane when he originally testified and that this proof created a real doubt as to the dying declaration.

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* The statement is misleading since the name of the nurse, Dorothy Cancro, did not appear on the only record which was in court—neither her married nor her maiden name (S.M. pp. 175, 339, 340).

† One of the original dissenters, then Chief Judge Lewis, retired before the reargument.

Judge Desmond rejected the view of the majority that the Court was "so tightly bound" by New York's rule with respect to "newly discovered" evidence (Code Crim. Proc. § 465, subd. 7) that it must close its eyes to the real facts. As to Janson he said:

> "I still think that a new jury should decide whether or not it is safe to accept the testimony of a witness who went straight from the courtroom to a mental institution, and the seriousness of whose mental illness was certainly not disclosed, during the trial, to defense counsel. It is unreasonable to charge defense counsel with lack of diligence in discovering the facts as to Janson, facts which were diligently kept from him by those whose duty it was to disclose all pertinent information about a witness, especially in a first degree murder case. It cannot be stressed too much that Janson was the only witness who identified defendant as the killer."

As to the dying declaration, he stated:

> "* * * That testimony obviously came as a complete surprise to defense counsel at the trial. To say now that the latter should have stopped the trial and made a prompt and thorough investigation, as to the probability or possibility of that declaration ever having been made at all, is to demand the impossible. Even if a long delay in the trial, for such an investigation, could have been had, how could any lawyer, in such a situation, have guessed at the existence of testimony which it has since taken months or years to uncover? How could defense counsel have imagined that elaborate investigations, later made, would turn up two physicians, two nurses, two police officers and several other persons, each prepared to give testimony of greater or less definiteness, completeness and weight, to the effect that the dying declaration could not have been made by decedent or heard by Forlenza?"

Judge Desmond pointed out that the Court had power to order a new trial "if justice so requires" (Code Crim. Proc. § 528).

(f) How the Federal Issue Was Raised

The federal question sought to be reviewed was raised in the application for the writ coram nobis and again in the 1955 motion for a new trial and was urged in the Court of Appeals in the following manner:

In the coram nobis application in the petition dated December 6, 1954, in paragraph Seventh thereof in which it was expressly stated that it would be a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution to permit this conviction to stand.

The same contention was expressly made in the 1955 motion for a new trial.

In the notice of appeal to the Court of Appeals from the dismissal of the coram nobis petition it was expressly stated that such denial constituted a denial of due process under the Fourteenth Amendment. A like statement was contained in the application for reargument which served to bring to the Court of Appeals a review of the denial of the motion for a new trial.

The objection to the conduct of Judge Goldstein in connection with the new autopsy appears on the minutes of the hearing (S.M., pp. 971-982).

The portions of the record relied on are set forth in Appendix E (pp. 60-64, *infra*).

(g) The Reasons Relied on for the Issuance of the Writ

The state court has, in a capital case, so narrowly conceived the requirements of due process as to conflict with principles laid down by this Court.

In defining due process this Court has never felt bound by any rigid definition.

As Justice Cardozo said in *Palko* v. *Connecticut*, 302 U. S. 319, 325, due process embodies concepts that are "of the very essence of a scheme of ordered liberty."

In *Betts* v. *Brady*, 316 U. S. 455, 462, Justice Roberts pointed out that "Asserted denial is to be tested by an appraisal of the totality of facts in a given case."

More recently, in *Malinski* v. *New York*, 324 U. S. 416, Justice Frankfurter said that this Court was under the obligation to determine from "the whole course of the proceedings * * * whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples."

These views were unanimously applied by this Court in *Rochin* v. *California*, 342 U. S. 165, to reverse a conviction because of the manner in which it had been obtained.

Furthermore, this Court has recognized that special considerations are applicable to capital cases: *Powell* v. *Alabama*, 287 U. S. 45; *Patterson* v. *Alabama*, 294 U. S. 600; *Williams* v. *Georgia*, 349 U. S. 375. As Justice Frankfurter said in this most recent decision: "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant."

In the case at bar there are several factors which, we respectfully submit, compel consideration by this Court. Petitioner was convicted on the basis of the testimony of two witnesses, Janson and James Forlenza. Yet there is the gravest doubt whether the testimony of either of them would be accepted by a jury with knowledge of all the facts now in the record.

1. The jury was not informed at the trial that Janson, the only witness who identified petitioner as the killer, had

attempted to commit suicide while held in jail as a material witness nor that after he testified he was held incommunicado and that his actions and speech at the time were such that the District Attorney had him examined by his own medical consultant. Obviously the jury never knew that the day after it brought in its verdict Janson was sent to Bellevue and then certified as insane. Statements made by Janson as recorded by the hospital indicated great uncertainty about his trial testimony.

We submit that it is no answer to say, as did the Court of Appeals, that it accepts Judge Goldstein's finding that Janson was sane when he testified. That is not the issue. For regardless of Janson's technical competency to testify, it is inconceivable that the requirements of due process have been met when a man is sent to his death without consideration by a jury of the weight to be given to the testimony of a witness so situated.

Pertinent in that connection are the remarks of Justice Frankfurter, dissenting in *Smith* v. *Baldi*, 344 U. S. 561, at 572 (and concurred in by Justices Black and Douglas). There petitioner had been found sane at a hearing on the basis of testimony given by an expert who himself was later committed because of an incurable mental disease. Although the commitment did not occur for several years after his testimony, Justice Frankfurter said (p. 573):

> "* * * But to allow the victim of this testimony, which, in any event, has been brought into doubt, to go to his death without an opportunity for reassessment, by either State or federal court, of the basis for the rejection of his plea of insanity would constitute a denial of due process no less gross than if the sentence had been imposed without any hearing at all on the issue of sanity."

So here, there should be a reassessment, not of the technical condition of the witness Janson, but of the impact the new facts have on his credibility. Such reassessment

can obviously be made only by a new jury. For no court can say as matter of law that the new facts would have no impact on a jury.

Moreover here, as Judge Desmond points out, facts were concealed from the defense by the prosecution. That itself constitutes denial of due process. Cf. *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213.

2. The jury at the trial no doubt accepted the testimony of James Forlenza that his brother had told him he had been shot by petitioner. Now it appears from unimpeachable witnesses that this is not so—or at least a jury could readily so conclude.

At the trial the issue of James Forlenza's presence at the bedside around 5 P. M. rested on his own testimony, supported by his wife. No one contradicted that. For Detective Mangrone who said he had not seen James there (fol. 917) had left before 5 P. M. (fol. 915). And Evelyn could not say that James wasn't there (fols. 1366-68).

At the motion hearing testimony was given by five witnesses (two of them produced by the prosecution) in no way connected with the defense, that James had not been there.* Each of those witnesses was present until Walter was removed to the operating room. At least two of them were unknown to the defense at the trial.

It was, therefore, incorrect for Judge Goldstein to say that the issue as to whether James was at the hospital had been "fully explored at the trial." It was likewise incorrect to treat this issue, as did Judge Dye, as one relating to the "time" when the declaration was made.

The fact is that at the trial attention was called to discrepancies in James' own previous statements as to time, but the defense was in no position to show that James had actually not been at the hospital at all just before Walter

* In addition, Donato said James wasn't there.

was removed to the operating room. Since both James and his wife so fixed the time of his presence, the new evidence contradicting their stories was *new*, not cumulative. And it was of vital importance. For if James lied about having been there then it is of no consequence whether or not Walter had been able to talk.

Surely it would be a denial of due process to permit a man to go to his death when the chief testimony against him rests on such shaky foundations and no jury has passed on its credibility after hearing all the witnesses now available.

3. It is true, as both Judge Goldstein and Judge Dye pointed out, that at the trial the defense had not raised the issue that Walter could not talk. It must be remembered that the defense was not prepared for that issue, that no mention had been made by the District Attorney in his opening of any dying declaration (see fols. 91-96). As Judge Desmond pointed out, it is asking too much of a defense to be able to prepare itself in the middle of a trial * on such an issue. It is not strange, therefore, that the defense should have done the best it could and tried to show by Walter's mistress, Evelyn, that he had said he didn't know who shot him. Moreover, her testimony by no means established that Walter had talked around 5 P. M. She indeed started to say that he couldn't talk then (see fol. 1358). And no time was fixed for the occasions when she said he had talked to her (fol. 1359)—and she wasn't cross-examined on the point. So actually there is no inconsistency in the positions taken by the defense—Walter might have been able to talk earlier, but not by 5 P. M.

There was a conflict in the medical testimony upon the motion hearing as to Walter's ability to talk. The prosecution's physicians, who had not seen Walter in his life-

* James' testimony was given on the afternoon of the third day (fols. 33, 572, 683).

time (S.M. pp. 902, 1061), expressed affirmative opinions of ability to talk (S.M. pp. 922, 1006) predicated upon autopsy findings. Petitioner's medical evidence of inability to talk came from a nurse and two disinterested physicians who had observed, examined and treated Walter prior to his death (S.M. pp. 96, 183, 283). In any event the conflict between the opinion evidence on the one hand and that based upon personal observation and knowledge was not the function of the trial court to resolve. Concededly, petitioner's witnesses were of high standing and character with honorable and unimpeachable backgrounds who had no motive or interest to favor him. Petitioner was entitled to a jury's judgment upon the credibility of these witnesses and the resolution of this vital issue which involves his life.

4. It is elementary that it is a denial of due process for any part of a criminal trial to be conducted in the absence of counsel for the defendant. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 116; *United States* v. *Hayman*, 342 U. S. 205, 220.

That principle applies here since petitioner was advised that the examination of the body of the murdered man would be for a limited purpose, when in fact it was conducted on a much broader basis. Nor was petitioner advised that the Court planned to examine witnesses. As soon as counsel were advised of what happened they claimed that petitioner's rights under the Fourteenth Amendment had been infringed.

5. By so construing the statute relating to new trials (Code Cr. Proc. § 465, subd. 7) as not applicable to this case the Court of Appeals has denied petitioner all redress and so deprived him of due process of law. For that Court had previously ruled that coram nobis was not applicable in this very case (308 N. Y. 863). And it had earlier ruled that Habeas Corpus does not lie to challenge a conviction

on grounds such as are here relied on. *Matter of Hogan* v. *New York Supreme Court*, 295 N. Y. 92; *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19.

Clearly due process is denied unless the state affords some corrective process: *Mooney* v. *Holohan*, 294 U. S. 103, *Ex parte Hawk*, 331 U. S. 114; Cf. *Frisbie* v. *Collins*, 342 U. S. 519; *Brown* v. *Allen*, 344 U. S. 443, 458.

CONCLUSION

We respectfully submit that this Court should grant certiorari and dispose of the issues raised and not require petitioner to institute habeas corpus proceedings in the United States District Court. Cf. *Leyra* v. *New York*, 345 U. S. 918, and *Leyra* v. *Denno*, 347 U. S. 556.

Respectfully submitted,

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APPENDIX A

Court of General Sessions Opinion

(New York Law Journal, Thursday, April 28, 1955.)

By Goldstein, J.

People, &c., v. Leonardo Salemi—The defendant moves to vacate and set aside the jury's verdict convicting him of murder in the first degree and to grant him a new trial on the ground of alleged newly discovered evidence showing that one of the People's witnesses, James Forlenza, committed perjury in his testimony at the trial with respect to a dying declaration made to him by the deceased.

This is the second motion for a new trial.

The defendant was convicted on November 20, 1952. Before the mandatory judgment of death was pronounced, the defendant moved for a new trial, claiming that the sole identifying witness, Paul Jansen, was suffering from a mental illness which rendered him incompetent to testify and that the mental condition of this witness was not known to the defendant or his attorney at the time of the trial; in addition the defense produced witnesses, allegedly newly discovered since the trial, who testified that they were present at the scene and that the defendant did not shoot the deceased.

After a full hearing, that motion for a new trial was denied (see opinion dated June 17, 1953). The mandatory judgment of death was pronounced on June 24, 1953.

An appeal was taken from the conviction and from the denial of the motion for a new trial. The Court of Appeals affirmed the conviction on March 12, 1954 (People, &c., v. Salemi, 306 N. Y., 863). Motions for reargument were denied by the Court of Appeals. An application to

the United States Supreme Court for a writ of certiorari was denied.

The attorneys for the defendant contend that subsequent to the above proceedings they unearthed evidence establishing that the dying declaration testified to by James Forlenza, a brother of the deceased, was untrue and the product of outrageous perjury. Thereafter the defendant moved for a writ of error coram nobis, alleging that the dying declaration was perjurious and that the deceased was physically unable to speak or utter any intelligible sounds. The motion for a writ of error coram nobis was dismissed without a hearing on the ground that it did not lie as a matter of law.

The Court of Appeals affirmed the order dismissing the writ of error coram nobis, but in its memorandum of affirmance, said that the determination was made "without prejudice to an application for a new trial in respect to the dying declaration."

In accordance with the memorandum opinion of the Court of Appeals the defendant brought this motion for a new trial.

The evidence produced on this motion does not in my opinion come within the provisions of section 465, subdivision 7, of the Code of Criminal Procedure, as interpreted by the decisions, i. e., it was not newly discovered, since, with due diligence, it could have been produced at the trial and certainly prior to the pronouncement of judgment six months after conviction.

Nevertheless, because of the death penalty, the court will not deny the motion solely because the evidence on this application failed to come within the provisions of section 465, subdivision 7, of the Code of Criminal Procedure.

On this motion, the defense contended that newly discovered evidence established (a) that the deceased was incapable of uttering intelligible sounds and therefore could

not have made the dying declaration to his brother, James Forlenza, and (b) that James Forlenza was not present at the hospital on February 27, 1952, when he claimed the dying declaration was made to him. The issue of fact as to whether James Forlenza was at the hospital on February 27, 1952, was fully explored at the trial, and the credibility of the dying declaration was passed upon by the trial jury. The evidence offered here on the question of his presence was merely cumulative.

No testimony was offered at the trial as to the deceased's inability to make the dying declaration. In fact, at the trial, the defense produced the witness Evelyn Forlenza, who had been living with the deceased, to testify to what the deceased had told her at the hospital.

Now seeking to substitute a new defense for a discredited one (see People v. Cacopardo, 305 N. Y., 883, aff'g 281 App. Div., 884), the defendant now contends that the deceased was completely unable to talk at that time. In support thereof, he produced Doctors Kenneth J. Strully and Lester Breidenbach, the former being the one who performed the operation upon the deceased, and the latter being the chief surgeon of Beth David Hospital, who observed the patient and made an examination of him; also, the witnesses, Anita Blanchard, the floor nurse on duty when the deceased was brought in as a patient, and Mrs. Cancro, the special nurse who attended him.

Dr. Strully testified that there were several teeth missing from the front of the patient's mouth, that his lower jaw was fractured, that the trachea was shifted to the left side because of the huge swelling on the right side of the neck and that his lung was collapsed, all of which, in his opinion, made it extremely difficult, if not impossible, for the patient to speak. On cross-examination, he modified his testimony, claiming that it was the upper jaw and not the lower jaw that was fractured, but held to his opinion as to the patient's inability to speak.

Dr. Breidenbach testified that, upon examination of the patient, he found that he had a fractured lower jaw, a markedly swollen tongue with a tremendous swelling in the neck, and two or three teeth were missing from the upper jaw and one or two from the lower jaw, all from the front of the mouth. Even after having been shown the autopsy report which indicated that all front teeth in the upper and lower jaw were present and that neither jaw was fractured, Dr. Breidenbach insisted that his examination of the patient's mouth, made with a light and tongue depressor, revealed that several teeth were missing from the front of the mouth; that the lower jaw was fractured and the tongue damaged. In his opinion these injuries, coupled with the fact that the patient did not talk to him, made it physically impossible for the patient to talk.

These doctors' opinions were sharply challenged by the People's proof adduced through several witnesses who testified that the patient talked to them while he was in the hospital and before he was operated upon. Moreover, the doctors' testimony as to the missing teeth and fractured jaw was at variance with the findings contained in the autopsy report which showed no front teeth missing, and no fracture of the upper or lower jaw and no injury to the trachea.

In addition, Dr. Benjamin Vance, deputy chief medical examiner, who was present at the autopsy, testified that in his opinion the injuries sustained by the deceased, either standing by themselves or taken together, would not have made it impossible for the patient to talk before his death.

In view of the diametrically opposed views as to what the injuries suffered by the deceased were, the court determined to lay at rest any conflict between the doctors as to what the actual physical condition of the deceased was and directed that arrangements be made to exhume the body for re-examination. This gruesome task was completed at St. Raymond's Cemetery, there being present at

the time of the re-examination the court, the assistant district attorney, the attorneys representing the defendant, Dr. Milton Helpern, the chief medical examiner, Dr. Benjamin M. Vance, the deputy chief medical examiner, and Dr. Milton Birnkrant, a doctor attached to the Beth David Hospital, who was present representing the defense, and two stenographers. The attorneys for the defendant and the assistant district attorney were invited to witness the re-examination of the body in the receiving chamber. They declined the invitation and remained close by. Disagreeable as it was, the court deemed it its duty to be present at every phase of the re-examination of the body which was made by Dr. Helpern. A re-examination of the body, which fortunately was well preserved, was made and showed the following facts: the upper jaw revealed that, except for one molar, all the teeth were present, intact and firmly set in the jaw, and none of the teeth were loose. The upper third molar was absent because of an apparently old extraction. The maxilla was intact and unbroken but showed a roughened spot (a nick) caused by the passage of a bullet. The lower jaw showed three molars absent on the left side as a result of extractions made long before death, with all the other teeth regular in alignment and all firmly set in the jaw; no loose teeth and no teeth recently lost. There was no obstruction of the pharynx or of the larynx nor injuries of the larynx (sound box). There was no fracture of the lower jaw and the hyoid bone and the upper part of the trachea were intact.

To avoid any possible issue of fact developing between Dr. Helpern, the chief medical examiner, and Dr. Birnkrant, representing the defense, the court, on several occasions during the re-examination of the body, asked Dr. Birnkrant whether he agreed with the statements dictated by Dr. Helpern as to his findings. The court, at the end of the examination, specifically asked Dr. Birnkrant, "You have heard all the statements that Dr. Helpern has dictated, and do you agree that they are correct statements," to which Dr. Birnkrant answered, "I do."

The re-examination of the body showed that contrary to Doctors Strully and Breidenbach's testimony, there were no front teeth missing, no injury to the sound box, no organ necessary for speech was damaged, the tongue, the larynx and the trachea were all uninjured and there was no fracture of the lower jaw. Dr. Helpern retraced the tracks of both bullets and physically demonstrated that neither bullet track affected any of the organs of speech. Doubtlessly Doctors Strully and Breidenbach based their testimony in part on the misinformation contained in the hospital records. These doctors were apparently mistaken as to the physical condition of the patient's lower jaw, teeth, trachea and lung, on which they based their respective opinions that the deceased could not talk.

From this visual demonstration, the court came to the irresistible conclusion that there was no physical impediment to the patient speaking if he so desired. I find as a fact that the patient while in the hospital was able to speak and did speak to several people. The jury, having passed on the credibility of the dying declaration which the deceased made to his brother James, it is not for this court to disturb that finding.

The reluctance of the patient to speak to the doctors and nurses and his response to their questions with unintelligible, gutteral sounds and motions of his head was doubtless due to the patient's suspicion of all persons in authority and the code of the underworld which frowns upon talking with police or with others in whom he does not have implicit trust. The court is satisfied that the deceased lived by the code of the underworld and died by that code, refusing to talk to any persons other than those in whom he had complete confidence.

Not entirely without significance is the revelation, for the first time, of a motive for the shooting. The witness Donato, a friend of both the deceased and the defendant, testified that while he was an inmate in the City Prison in

December of 1952, he talked with the defendant, who told him that he, the deceased and one Albert Corado were partners in the sale of narcotics; that they had a falling out and as a result of that the defendant shot the deceased.

Counsel for the defendant vigorously urged, in a masterly argument, that the court should not pass on the issue of fact as to whether the deceased was or was not capable of talking. Counsel urged that, apart from all considerations relating to whether the deceased made the dying declaration to his brother and whether or not he spoke to the other witnesses, the evidence relating to the deceased's ability or inability to speak was of such a contradictory character that it should be passed upon as an issue of fact by a new jury on a re-trial.

The court cannot see its way clear to go along with that argument. At the trial the defendant relied on an alibi which was rejected by the jury as being entirely false. On a previous motion for a new trial, the defendant produced witnesses prepared to testify falsely that they were present at the time of the shooting and that the defendant did not do the shooting (see opinion of June 17, 1953).

In the light of the false alibi presented at the trial, it cannot be said that the evidence presented on this motion, if received at the trial, would probably have changed the verdict. In my judgment, had the evidence adduced by the People on this motion been elicited at the trial, it would only have served to confirm the jury's belief in the defendant's guilt.

The court finds that no perjury or fraud was committed by the witness James Forlenza, as charged on this motion.

Upon all the proceedings in this case and all the testimony produced on this hearing which confirms the jury's finding that the defendant was the slayer of the deceased, the court would not be justified in setting aside the jury's verdict and granting a new trial.

The motion is in all respects denied.

The district attorney is directed to submit an order in accordance with this decision.

Court of Appeals Opinions

DYE, J.:

On March 12, 1954 we affirmed by a divided court this defendant's appeal from a judgment of the Court of General Sessions of the County of New York (Goldstein, J., and a special jury) rendered June 24, 1953 upon a verdict convicting defendant of the crime of murder in the first degree and from an order of said court made June 17, 1953, following a hearing, denying defendant's motion for a new trial on newly discovered evidence (*People* v. *Salemi,* 306 N. Y. 863). On June 1, 1955, we granted defendant's motion for a reargument of his appeal so that we might review an order of the Court of General Sessions made by Hon. Jonah Goldstein, following a hearing denying defendant's motion for a new trial on newly discovered evidence (*People* v. *Regan,* 292 N. Y. 109; *People* v. *Dunn and Gentile,* 298 N. Y. 706; *People* v. *Stein,* 303 N. Y. 627). By this means we are able to test the new matter as if it had originally been a part of the main record. We have done that in this instance.

Briefly, the record shows that at about 8:40 P. M. March 26, 1952, Walter Forlenza was shot and fatally wounded as he sat alone at a table in the dining room of the Belvedere Bar and Grill located at 2052 Second Avenue between 105th and 106th Streets, Borough of Manhattan, New York City; two bullets from a 32 caliber pistol were fired at close range. He died undergoing an emergency operation for the removal of one of the bullets that had lodged near and partially severed the spinal cord. In the confusion following the shooting, the assailant, with a pistol in his right

hand, ran out and disappeared. The defendant was suspected and widely sought. Some ten weeks later and on May 14th, accompanied by his counsel, he voluntarily surrendered himself to the District Attorney. Thereafter and on June 19, 1952, the grand jury of the County of New York returned an indictment accusing the defendant of the crime of common law murder. The trial was held in the Court of General Sessions before Hon. Jonah Goldstein and a special jury commencing November 12, 1952. At the trial the People did not prove motivation but did show that the defendant and his victim for a long period of time had been friends and acquaintances and that there had been "argument" from which the jury could properly infer that defendant had a grievance against decedent. Identification was furnished by two witnesses present at the time and both of whom knew the defendant, one Paul H. (Whitey) Janson, a patron sitting at the bar, positively identified the defendant as the man whom he had seen standing over the deceased with a gun in his hand immediately after the shooting—the other, Andrew Bertorelli, a part-owner of the tavern, placed the defendant in the bar a few minutes earlier. In addition, the People offered as a dying declaration and it was so received, a conversation had between James Forlenza and the deceased a few hours before he died in which the deceased named the defendant as his assailant. Other witnesses were called to show flight or concealment to account for defendant's disappearance for upwards of ten weeks. The defendant did not take the stand in his own behalf. He relied on his plea of not guilty and his defense of an alibi furnished by witnesses who placed him near a restaurant in Queens at about the time of the shooting. Defense counsel attempted to discredit, on cross-examination, the reliability of the People's witnesses. In an effort to contradict and impeach as a falsity the dying declaration, the defense called the wife of the victim to testify that he had told her he did not know who shot him. On November 20, 1952, the jury

rendered a verdict of guilty as charged in the indictment. Prior to sentence which had been set down for December 12, 1952, counsel for the defendant was advised by the court that while the witness Janson was being held in prison as a material witness and two days before he testified at the trial he had rammed his head in the bars of his cell inflicting a severe gash in his scalp requiring eight stitches to close. Thereafter he was lodged in a hotel under guard; that on the evening following the coming in of the verdict Janson had been sent to Bellevue for observation as to his mental condition which was then described as "psychotic." On December 4, 1952, he was sent to the Pilgrim State Hospital for treatment. The court postponed sentence apparently for the purpose of allowing counsel for the defendant to look into the matter and at the same time advised counsel that the hospital records would be made available to him for use in preparing a formal motion. On March 12th, nearly six months after the verdict, the defendant formally moved to set aside the verdict and for a new trial based on two grounds, first that Janson was mentally incompetent at the time he testified and secondly that new evidence had been discovered supporting defendant's claim of innocence.

The Court permitted the case to be reopened for the purpose of receiving evidence bearing on the defendant's contentions. Hearings were held beginning May 19, 1952, at which time the defendant called a psychiatrist to testify that in his opinion Janson was mentally incompetent at the time he testified. The expert concededly had never personally examined the witness Janson. He based his opinion upon Janson's trial testimony, statements made by him to examiners at the mental hospital as contained in the hospital records, and Janson's self-inflicted injury. The People's expert, Dr. Lichtenstein, who had examined Janson prior to his being called to testify at the new trial, gave as his opinion that Janson was sane at the time of testifying.

At the main trial Janson, who knew both defendant and the deceased and had been present in the Belvedere on the night in question at the time of the shooting, identified the defendant as the assailant. The matter developed by the defense at the new trial hearing to show that Janson at the time he testified, was moody and depressed both before and after the suicide attempt, was not new matter at all, but had been before the Court and Jury on the main trial. The suicide attempt was there brought out and fully explored at least to the extent that Janson had blown "his top" and had deliberately butted his head against the iron cell bars causing a deep scalp wound requiring several stitches to close. During the course of his cross-examination the suicide episode was adverted to several different times and he was asked whether he had been in a mental hospital or had psychiatric treatment. He even was asked to exhibit his scalp to the jury. In summation, the defense counsel commented on the episode at length and called Janson "the man who purposely banged his head against the bars." At the motion hearing Janson was recalled. He had been released from the hospital in custody of his wife sometime previously. He testified that on July 2, 1952 after a witness, the bartender at the Belvedere had been found strangled to death in First Avenue—he had been locked up as a material witness, for which he was "only too glad." As the trial date approached, owing to his knowledge of the bartender's fate—he became obsessed by fear and terror as to what might happen if he testified; he said that on November 11, 1952, he "blew his top" and tried to commit suicide by deliberately running his head into the bars. He repeated without material inconsistency, identification testimony given on the main trial. His testimony at the hearing was not shaken by cross-examination. We unanimously agreed that Judge Goldstein was right when he ruled that "on both occasions he (Janson) was competent to testify."

Judge Goldstein denied the motion for new trial. Upon the main appeal we reviewed the judgment of conviction rendered on the verdict of guilt and also the order denying defendant's motion for a new trial made at the reopened hearing. At that time the defendant argued that his conviction was not supported by the evidence—the trial issues had turned largely on identity, lack of motive and an alibi, —certain trial rulings were urged as erroneous. The adequacy of the jury charge was also questioned.

As to all these points we unanimously agreed that the judgment of conviction was amply sustained beyond any reasonable doubt; that on the record then before us, including both the minutes of the trial and the minutes on the motion for a new trial, the conduct of the trial was free from reversible error in all respects except that the dissenting Judges were of the view that "the court's charge did not marshal the evidence as required by *People* v. *O'Dell* (230 N. Y. 481)"; (*People* v. *Salemi*, 396 N. Y. 863). On that issue, the court was under no necessity of writing a formal statement of their view to the contrary as the law on that subject is governed by § 420 of the Code of Crimi-nay Procedure which provides "In charging a jury, the court must state to them, all matters of law which it thinks necessary for their information in giving their verdict and must, if requested, in addition to what it may deem its duty to say, inform the jury that they are the exclusive judges of all questions of fact."

While this statute emphasizes that the court shall charge the jury on all matters of law, it does not follow that the charge on the law shall be given with only slight reference to the facts. The better practice for the court in a capital case, we as long ago pointed out, even when uninvited by the defendant to do so, is to present to the jury the case on trial in all its phases in which the jury ought to consider it (*People* v. *Fanning*, 131 N. Y. 659). Here, as in the *O'Dell* case (230 N. Y. 481), we must examine the charge in

the setting of the case to determine whether the omission to detail all items of the evidence renders the charge so incomplete as to rquire a reversal and a new trial. In this case the court charged:

> "It is the prosecution's contention in this case that the defendant and the deceased Walter Forlenza knew each other, and that on Tuesday evening, February 26th, 1952 at about 8:30 P. M. in the Belvedere Bar and Grill at 2056 Second Avenue the deceased Walter Forlenza was sitting at a table in the dining section, and the defendant was allegedly at the bar, and it is claimed that the defendant walked to the table at which the deceased was seated and fired two shots at the deceased at close range. That the defendant immediately fled, and Walter Forlenza was removed to Beth David Hospital where he died the following day from the effects of the bullet wounds."

The Court adverted to the defendant's flight and his alibi by saying:

> "The prosecution claims that the defendant fled and was not seen or heard from until May 14th, 1952, when in the custody of his lawyer he surrendered himself at the District Attorney's office. It is the defendant's contention that on the night of shooting he was not in the Belvedere Bar and Grill. It is claimed that he was in a restaurant in Queens County.
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> "If you find as a fact that the defendant was not in the Belevedere Bar and Grill when the shooting occurred, then you should acquit him.
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> "If you find as a fact that the defendant was in the Belvedere Bar and Grill when the shooting occurred, but that he did not shoot the deceased, then you should acquit him."

The defendant, we must remember, relied on his plea of "not guilty" and his alibi witnesses. Under the proof the court said about all that could be said, for—as we know and as they had been instructed—the statute says: "The jury * * * are the exclusive judges of all questions of fact."

The issue was murder in the first degree. The shooting was quickly done. The lone assailant had fled and disappeared and the victim died of the wounds inflicted. What more was necessary to be said? The jury had heard all of the witnesses. We may assume that they had paid attention to the witnesses as they testified and were intelligent enough to remember the various incidental and collateral details without repetition by the court. On the main appeal we regarded the charge in the setting of this case as full and fair. Our view has not changed by our later reconsideration and we adhere to our former decision that no error was committed on this aspect of the case.

On that motion the defense also stressed as error the admission of testimony of James Forlenza concerning a dying declaration, for lack of proper foundation and veracity, inadequacy of the charge, etc., all of which Goldstein, J. carefully reconsidered and adhered to his former rulings. On the main appeal we considered all phases of the controversy concerning the admissibility and credibility of the dying declaration. We unanimously agreed that no error was assignable to that aspect of the case.

We now turn to the within order denying defendant's motion for a new trial based on alleged newly discovered evidence showing that the dying declaration naming the defendant-appellant as the killer was not made at the time claimed and could not have been made at any time because the victim's physical condition was such that he could not talk, a new claim made for the first time on this motion.

The power to grant an order for a new trial on the ground of newly discovered evidence is purely statutory. Such power may be exercised only when the requirements of the statute have been satisfied, the determination of which rests within the sound discretion of the court. So far as pertinent the statute provides, viz:

(Code Crim. Pro., § 465)

"§ 465. *In what cases granted.* The Court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases"

* * * * * *

"7. Where it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed."

The test thus enunciated was long ago approved in this Court, and since followed—viz: that "Newly discovered evidence in order to be sufficient must fulfill all of the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must not be merely impeaching or contradicting the former evidence." (*People* v. *Priori*, 164 N. Y. 459, 472; *People* v. *Eng Hing and Lee Dock*, 212 N. Y. 392). On this record these criteria are not satisfied.

At the trial James Forlenza, a brother of the victim was called by the People to testify to a conversation had with the victim shortly before his death, in which he named the defendant as the person who had shot him. This conversation was admitted over objection as a dying declaration. According to the witness' best recollection at the trial, the

conversation had taken place between 5 and 5:30 P. M. February 27, 1952.[1]

Although it appeared and was readily admitted that, in a prior written statement to the District Attorney, James had fixed the time at 1:00 P. M. and that when he testified before the Grand Jury he had fixed the time at between 4:00 and 4:30 P. M., the defense made no effort to clear up this inconsistency. The cross-examination of this witness was devoted almost entirely to discrediting the statement as a dying declaration on the ground that the declarant was not expected to die. James was cross-examined to the point of exhaustion on slight inconsistencies in language used on the three different occasions. Everyone, including the defense, proceeded on the theory that such a conversation had, in fact, taken place, the attack being centered at all times on its competency and materiality as a dying declaration, as to which more will be said later.

Returning to the issues as to the time the declaration was made, the defense called DETECTIVE MENGRONE, who visited the hospital four times between 1 A. M. and 4:30

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[1] "Q. Will you keep your voice up now. Mr. Forlenza, and tell us exactly what happened as you approached the bedside of your brother? A. When I approached the bedside of my brother I lifted up the flap of the oxygen tent and stuck my head in, bent over and asked him" 'How do you feel? He said" 'No good, very bad,' he says" 'I am not going to make it, I am going to die.'

Q. Did you say anything to him at that time, or did he say anything to you? A. He said to me" 'That is why I sent for you.' So I asked him, he said: 'That is why I sent for you tell you about what you asked me last night.'

And I said" 'Who shot you?'

He said" 'Nardi'.

I said" 'Nardi who?'

He said" 'Nardi Salemi, the fellow that I introduced you to.'

[Objections by defense overruled.]

Q. And when your brother said that did you say anything to him? A. No, he kept on talking.

Q. What else did he say? A. He said, 'I have five thousand dollars out in the street, see that it is collect.' "

[Objections by defense that no proper foundation for admission as dying declaration overruled.]

P. M. on February 27th, to testify that he saw other relatives of decedent but at no time did he see James either at the hospital or at the bedside.

Notwithstanding the existence of a time discrepancy, defense counsel barely mentioned it in his summation but devoted the greater part of his comment to an attempt to persuade the jury that the defendant was innocent and that the dying declaration was a false, perjurious fabrication.

Counsel for the People, in the course of his summation, pointed out that in the testimony by James as to the time, the statement was made according to his best recollection; that the inconsistency was explainable by the attendant anxiety incident to the stress and strain of the tragic news plus the utter lack of motive to testify falsely. The question, then, was fully presented to the jury and we must assume that they considered the inconsistency as unsubstantial. Notwithstanding this state of the record on the main appeal, counsel for the defense now argues that the inconsistency in time raises an issue of fact which should be resubmitted to the jury. At the hearing so-called newly discovered evidence calculated to throw new light on this point was presented. After a careful study of this testimony, we are constrained to conclude that it adds nothing to what was previously before the trial jury. For example:

Nurse Cancro said she was there between 4:30 and 5:15 P. M. when the patient was taken to the operating room and during that time had not seen James. However, on her cross-examination she conceded that when she returned from her lunch hour sometime between 12:30 and 1 P. M. she saw two men whom she did not know, at the patient's bedside, one of whom had his head inside the oxygen tent. Now it is true that this witness did not testify at the trial that she was unknown in the sense that the hospital chart did not give her married name. This, however, furnishes no basis for claiming she could not have been located. It

is not at all uncommon for professional women to use their maiden names. Furthermore, so far as this record shows, no effort was made at that time to locate her.

Dr. Strully, who between 4:30 and 5:15 aided in preparing the patient for the operation, testified that no outsiders were present during that time. His name appeared on hospital chart and was available.

Patsy Yannotti was at the bedside for a short while when preparations for the operation were commenced about 4:30 P. M. He left the ward and joined Evelyn and a friend named Donato in the adjacent hallway. During that time he did not see James Forlenza whom he knew.

The moving affidavit alleges that the identity of Yannotti did not become known until sometime in July, 1954. To the extent that the identity of Cancro and Yannotti were unknown by defense counsel at the time of the trial, I suppose it can be said with some plausibility that the testimony they gave at the hearing was newly discovered in the sense that these witnesses had not been interviewed by the defense counsel prior to the trial. Even if we assume this is so, it does not follow that "the failure to produce (their testimony) at the trial was not owing to want of diligence" (§ 465), for surely, the names of each one of these witnesses were either mentioned in the hospital records or could have been easily learned by the simplest sort of inquiry. Furthermore, even though we assume that such testimony would have been material to the issue, it cannot reasonably be said that "if before received" such evidence "would probably have changed the verdict" (§ 465). When these basic ingredients are lacking—and by any standard they are lacking here—the so-called newly discovered evidence does not qualify as the basis for granting a new trial (§ 465).

In reaching this conclusion, we have not limited our consideration of the testimony in accordance with the bare

language of the statute but have examined it in the light of the evidence as to this point contained in the record on the main appeal. The issue as to the exact time of the making of the dying declaration as testified to by James Forlenza, as we have seen, was fully explored at the trial, was adverted to by counsel in summation and its credibility passed upon by the jury. When this alleged newly discovered evidence is viewed against the main record in light of the best inference rule, the most that can be said concerning it, is that—at best, it is cumulative or designed merely to impeach or contradict the former evidence. It throws no new light on the issue (*People* v. *Priori, supra*). The statute requires that to justify granting a new trial it must be shown that the evidence "is not cumulative." This the appellant is unable to do. It should be mentioned that at the hearing the People met the so-called new evidence by calling several persons who had not testified at the trial.

Patrolman Snyder, who testified that while on duty between 4 P. M. and 9 P. M. the 27th, he saw two women at the bedside but did not recall seeing any men.

Patrolman Perrino, on duty between 8 A. M. and 4 P. M. who testified that he saw two men at the bedside about 1:30 P. M.

Jeanne Forlenza, a sister who saw James at the hospital at about 4:30 P. M. the 27th.

Anne Forlenza, a sister who saw James at the hospital at about 4-4:15 P. M. the 27th.

Anthony Donato, a friend of the Forlenza family for many years, that he reached the hospital with Yannotti about 3 P. M.; that they looked at Walter, said nothing and remained outside in the corridor until about 3:30 P. M. when they left. They returned about 4 P. M. During these times the witness did not see James.

MAUD FORLENZA, wife of James, who testified at the trial, was recalled to testify that her husband, James was at the bedside about 4:30 P. M. the 27th; that she left him and returned to her place of business where she was joined by James not later than 5:15 P. M.

As to this aspect of the attack on the dying declaration, Judge Goldstein determined that the time the declarant had made the statement to James was fully explored at the trial and that its credibility was passed upon by the trial jury. He accordingly rejected this aspect of the defendant's motion as a ground for granting a new trial. We cannot now say that, in so ruling, Judge Goldstein abused his discretion as a matter of law. It seems clear that on this phase of the record, nothing was shown requiring the Court to exercise his statutory power any differently than he did.

The defendant's contention that the dying declaration was never made because the decedent could not talk was not raised at the trial for the very good reason that the defense had proceeded on the theory that the testimony of James Forlenza was false and unworthy of belief because in conversations had with others the decedent had refused to name his assailant and that the alleged statement did not qualify as a dying declaration because the declarant had not expected to die, the purpose being—of course—to throw doubt on the credibility of James and the declarant. For this purpose the defense had called EVELYN to testify affirmatively that she talked with her husband between 4 and 5:30 P. M. on the 27th.[2]

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[2] "Q. Did you talk to your husband? A. Yes.

Q. And between four and 5:30 did you talk to him? A. Well, he couldn't—yes, I was talking to him but he was under oxygen and I couldn't talk to him much.

Q. You couldn't talk too much? A. No, because I would take all the oxygen out of the tent.

Q. Did you see James Forlenza there between the hours of 4 and

It seems clear beyond dispute that at the trial the defense assumed throughout that Walter could and did talk. At no time was the dying declaration assailed because it was not made due to declarant's inability to talk, but solely on the ground that he had said something else and this at a time when they had the hospital records and autopsy report in court, when the names of Nurses Blanchard and Cancro and Doctors Strully and Breidenbach were known to the defense and whom the defense did not call, although available.

At the motion hearing these persons who had not been trial witnesses all testified on the issue of decedent's ability to talk:

NURSE BLANCHARD in charge of the floor and NURSE CANCRO Special Nurse both testified to the fact that they had no recollection of having heard the decedent say anything at all.

DR. STRULLY was of the opinion that the patient could not have carried on a conversation as testified to by James. He based this opinion on the circumstance that the decedent had made no reply to his routine inquiries; that based on the hospital report, he believed some teeth were missing but had not verified this by an independent examination as patient's face, mouth and neck were swollen and that, in his opinion, the patient could not have carried on a conversation, as testified to by James.

5:30? A. No.

Q. Did you ask Walter Forlenza who shot him? A. Yes.

Q. What did he tell you? A. He says he didn't know. He says 'All I was doing was sitting down eating.'

Q. Did he at any time ever tell you that Salemi shot him? A. No.

Q. Did you ask him that question constantly? A. I kept asking him to tell me who done it.

Q. And he always said to you what? A. 'I don't know.'

Mr. Fruchtman: That is all. Your witness."

Dr. Breidenbach, that when he saw the patient he found some teeth missing; that the patient's mouth, tongue and neck were badly swollen due to injury from the bullets and that he suspected the jaw had been fractured; that patient was in a semi-stupor and very weak and that, in his opinion, he was in no condition to have talked, as claimed.

All of this testimony was completely opposed to the theory adopted at the trial and, as such, served only to impeach and contradict former evidence which we have said is not new evidence of the sort warranting the granting of a new trial (*People* v. *Eng Hing and Lee Dock*, 213 N. Y. 373, *supra*).

Furthermore, such testimony was all available at the time of the trial but for reasons best known to the defense, the alleged inability of the decedent to talk was never mentioned.

When the People offered the dying declaration the defense claimed no surprise which he might have done if he actually believed that decedent could not talk, as now claimed, but he could not do so at that time as the trial strategy was based on the theory that the decedent could have and did talk. To now claim surprise is proposing an after-thought based on a desperate effort to find new grounds for the granting of another trial. Furthermore, defense counsel, having failed to convince the jury on the theory that decedent was lying when he named defendant as his assailant, it seems rather late for a new counsel to ask that the case be reopened in order to introduce an entirely new and contradictory theory respecting the validity of the dying declaration. The trial strategy, we must assume, was carefully and deliberately planned. Having failed in its purpose, we know of no reason for permitting the case to be reopened in order to try out a different and opposing theory.

We must bear in mind that this case has been exhaustively litigated. More than six months intervened between the verdict of guilt and the sentence in order to permit de-

fense to explore the Janson episode and renew many of the contentions made at trial and rejected by both court and jury. Following our affirmance, many other motions were made [3] including two to the Supreme Court of the United States, none of which raised any issue as to declarant's ability to speak. There is overwhelming evidence that decedent did speak—and to various persons at various times—for instance:

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[3] Motions for reargument of appeal and for an order of recall and amended remittitur denied	April 15, 1954 (306 N. Y. 946)
Motion for stay of execution pending determination of petition for writ of certiorari in U. S. Supreme Court denied	April 23, 1954 (306 N. Y. 978)
Execution stayed by Mr. Justice Stanley Reed, Associate Justice of the U. S. Supreme Court	April 24, 1954 (not reported)
Certiorari denied	Oct. 14, 1954 (348 U. S. 845)
Rehearing denied	Nov. 22, 1954 (348 U. S. 890)
Petition for writ of error coram nobis dismissed	December, 1954 (not reported)
Certificate granted by Desmond, J., permitting appeal from dismissal of writ of error coram nobis	February 4, 1955 (not reported)
Order dismissing petition for writ of error coram nobis affirmed, Desmond and Van Voorhis, JJ., dissenting	March 11, 1955 (308 N. Y. 863)
Motion granted pursuant to § 503 Code Crim. Pro., setting week beginning April 18, 1955 for date of the death sentence	308 N. Y. 883
Motions for vacating judgment of death and for a new trial upon ground of newly discovered evidence denied	April 27, 1955 N. Y. L. J. April 28, 1955, p. 8, Col. 4.
Motion for reopening proceeding and for reargument of motion for new trial granted.	May 5, 1955 (not reported)
Motion for reargument of application for new trial denied	May 10, 1955 (not reported)

MAUD FORLENZA, wife of James and the two sisters, Anne and Jeanne testified that there was almost a continuous flow of conversation.

MARY KARASIK, to the effect that Nurse Blanchard had overheard the patient asking his wife how their child was.

EVELYN FORLENZA, who testified at the main trial for the defense and at the hearing for the People, in each instance to a conversation had with decedent, but which was contradictory she having testified at the trial that decedent did not state who shot him—while at the hearing she testified that she lied at the trial and that, in fact, the decedent had told her about 11 A. M. on February 27th that the defendant had shot him. She said that the deceased had her swear that she would not disclose the information except to his brother, James, and then only in case that he should die.

EVELYN explained her recantation on the ground that on the main trial she was literally "scared to death." Well she might have been. She had just borne a baby out of wedlock, fathered by the victim, Walter. She was familiar with the fact that Walter "had money in the street" which, if collected, would go towards the support of the infant; that decedent had made the statement under a solemn promise that she tell no one but James and then only if he should die; that to be careful of herself and the baby "as something might happen" to them and not to move back to Harlem; that the bartender Pauitta, who had witnessed the shooting from his unobstructed vantage point behind the bar, met violent death by strangulation shortly after he had testified before the grand jury. She knew that following this tragic coincidence, other witnesses, Bertorelli and Janson were taken into custody as material witnesses and that James had been given a police bodyguard. She knew the ramifications of the narcotic trade and the peril attend-

ing a "squealer." The trial was sensational and it is little wonder that Evelyn chose the easy way out. After all, she was a mother protecting her own in face of stark realities of life as she knew and understood them. Her recantation as to the contents of the conversation which at one time even the defense counsel conceded she had with the decedent, was thus fully explained.

Nothing of significance flows from the failure of the People to recall James Forlenza on the hearing. His testimony on the trial had been subjected to a most thorough and exhaustive cross-examination. Nothing remained for him to say.

Perhaps a word should be mentioned concerning another character named Anthony Donato (or Tony Iodine), a trafficker in narcotics with a long criminal record. He knew both the decedent and the defendant. On the 26th he visited the victim's bedside and in Italian asked decedent who had shot him; decedent did not answer but "rolled his eyes toward the officer standing behind the bed"; the following day he returned at about 10:30 A. M.; when Evelyn and Lizzi (Louis Farladi) stepped out for a moment, he put his head under the tent and again asked the victim who had shot him and was told in a painful way "Nardi" and to tell Albert "to watch out"; that he had no feeling in his legs and that he believed he "could not make it." Donato left when ordered out by a nurse.

Judge Goldstein had presided at the trial. He was thoroughly familiar with every aspect of this case. When Doctors Strully and Breidenbach testified with respect to the decedent's physical condition contrary to the autopsy report, factual issues were raised presenting a serious question of weight and credibility. It could only be solved by a re-examination of the decedent's body. It is now contended that this re-examination prejudiced defendant, by depriving him of his right to due process. This contention is based on the circumstance that the examination was not

for the purpose of determining the cause of death, which was already known, but to resolve a collateral matter, condition of the teeth, and whether the wounds were such as to have prevented speech prior to death.

As we view this aspect of the proof, we see no new issue of fact requiring submission to a new jury on the ground of newly discovered evidence. The opinion of Doctors Strully and Breidenbach that the victim was incapable of speech was based on a superficial examination of the outward effects of the injury—since concededly, they made no independent examination at the time—relying on statements contained in the hospital records, the generally weakened condition of the patient and the fact that he said nothing to them. The autopsy report subsequently made showed the true nature of the victim's condition. The missing teeth which had played so prominent a part in their diagnosis were, in fact, not the result of wounds but of a long prior extraction in normal course. While all can say that these witnesses were eminent physicians and honorably disposed, with no reason to testify falsely, they—nonetheless—were mistaken as to the actual damage caused by the bullets and had given their opinions in reliance on facts that were plainly and definitely inaccurate. The re-examination of the body demonstrated this inaccuracy and confirmed the original defense theory that the victim had, in fact, talked to various persons, as testified to on the trial. The medical examinations agreed that the wounds were not of such a nature as to prevent talking prior to death.

It is also contended that Goldstein, J. conducted the examination and interrogated witnesses not in the presence of counsel for the defendant. To state these objections is to demonstrate their absurdity. The record shows that the examination was attended by a physician of defendant's own choosing, Dr. Birnkrant; that counsel for defendant—and People as well—preferred to stand in the hallway and look through the door rather than be close spectators to the re-examination. A careful stenographic rec-

ord was made of the proceedings and no one contends that such record was incomplete or inaccurate. It demonstrates that defendant's rights were fully protected. It cannot reasonably be said that Judge Goldstein in any way prejudiced defendant's rights by asking Dr. Birnkrant from time to time if he saw, understood and agreed with what the operating pathologist, Dr. Vance was doing and the results found. True, Judge Goldstein swore the undertaker who had exhumed the body but only for the purpose of identification of the body, a most necessary and essential step in the proceeding. Had the presiding Judge not done these things—and he was not to be blamed if counsel preferred to remain out of hearing—he would, no doubt, have been charged with another kind of dereliction. In our view, Judge Goldstein acted with judicial propriety.

When this record is measured with the requirements of the statute, it cannot reasonably be said that the evidence adduced satisfies statute and case law as having been newly discovered for it is not such as could not have been discovered before the trial by the exercise of due diligence and even if we assume that it is material to the issue, it nonetheless is cumulative and any purpose it might serve is to impeach or contradict the former evidence; in fact, it cannot reasonably be said that it is of such a nature and quality as would probably change the result of a new trial if granted. As a matter of fact, the evidence adduced at the hearing—far from "probably changing the (jury's) verdict" would have made it easier for the jury to conclude that the defendant was guilty.

Furthermore, the statute contemplates diligence. Here trial counsel acknowledges that he made no investigation concerning the dying declaration until after the Supreme Court denied certiorari on November 22, 1954. The point now raised is clearly an afterthought and is not supported by evidence warranting the granting of a new trial as newly discovered within the meaning of § 465. This is not

the situation where the Court is depriving the jury of its right to determine an issue of fact, but rather whether the facts are sufficient to warrant setting aside the jury verdict and granting a new trial. We agree with the Court of General Sessions that the alleged newly discovered evidence is insufficient to warrant the granting of a new trial. We are also satisfied that this defendant has been accorded due process in accordance with applicable State law.

The judgment of conviction should be affirmed.

FULD, J. (Dissenting):

I was one of the bare majority of four who voted to affirm the judgment of conviction when this case was first before us (306 N. Y. 863). Although the record evidence was far from strong, I concluded that there was sufficient to justify a verdict of guilt. The new matter which has been developed and adduced upon the motions for a new trial, as well as upon the application for an order in the nature of a writ of error *coram nobis*, has radically changed the picture, and I cannot now, consistent with the dictates of conscience or the demands of due process, adhere to my original vote of affirmance. A refusal to direct a new trial would not only work an injustice upon Salemi but, even more important, would do a disservice to the administration of the criminal law.

The conviction against the defendant depended primarily upon the testimony of two witnesses, Paul Janson, who identified defendant as the killer, and James Forlenza, the deceased's brother, who testified that the victim had made a dying declaration to him, naming defendant as his assailant.

As to Janson, proof not before the jury demonstrates that he was insane at the time he testified against the defendant, and, as to Forlenza, the newly discovered evi-

dence creates a real doubt as to whether he ever received a dying declaration from his brother. No more need be said about the evidence relating to Janson, for it is indisputable that he was committed as an insane person on the very day after the jury returned its verdict of guilt against defendant.[1] And very little more need be said about the testimony bearing upon the authenticity and existence of the alleged dying declaration. It is enough to observe that, had the new matter been before the jurors at the trial, they would have heard—from witnesses of the highest character, whose honesty and sincerity are beyond all suspicion—not only that Forlenza was not at his brother's bedside in the hospital during the period he said he spoke to the latter and received the declaration, but that, in point of fact, the victim was in no condition, physically or mentally, to have uttered any statement. There was, it is true, conflicting testimony, but the vital thing is that the jury never heard the evidence which, if credited, would have gone far toward destroying the prosecution's case.

In arriving at my decision that there should be a reversal and a new trial, I would not be understood as saying that the defendant is not guilty—I do not know whether he is or not—or that the jury, with the new evidence before it, would have returned a verdict of acquittal. My view is simply that the original jury, or another, could reasonably and conscientiously have reached a verdict contrary to the one that was reported, on the basis of the matter recently uncovered and not adducible by the defense at the time of the original trial.

The judgment of conviction should, upon this reargument, be reversed and a new trial granted.

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[1] This material was before the court, in connection with an appeal from an order denying a motion for a new trial, when we originally affirmed the judgment of conviction. However, it did not then have the same impact as it does today when considered with the other evidence brought to our attention by the more recent applications.

DESMOND, J. (dissenting):

When defendant was tried, convicted and sentenced to death, all the important proof against him consisted of eye-witness identification testimony by witness Janson, and testimony by James Forlenza of an alleged dying declaration in which the victim is supposed to have named defendant as his slayer. On the trial record as it then stood, and despite the mystery as to motive or background, we held that the jury's guilty verdict was not against the weight of evidence. But, since our affirmance, quantities of new evidence have come to light, the existence and weight of which we must recognize. To my mind, the new proofs insistently demand a new trial for this defendant. In voting for such a new trial, this court would not be passing on defendant's guilt nor would we be reviewing again the weight of evidence as to that question. We would be seeing to it that this man does not go to the electric chair until a jury has heard this strange new series of conflicting and confusing narratives, many of them highly favorable to defendant. We would be upholding defendant's fundamental right to a full trial by jury.

Let us assume that the new information, not known at the trial, as to witness Janson's mental condition does not meet the requirements that new evidence, to call for a new trial, must be more than merely cumulative or contradicting or impeaching, that it must be such as could not by due diligence have been discovered before the trial, and that it must be such as would, if produced at a new trial, probably change the result (Code Crim. Pro., § 465, subd. 7; *People* v. *Priori*, 164 N. Y. 459). Let us go further and assume that the highest court of New York is so tightly bound by that rule that we must close our eyes to everything but the rule. On those two assumptions, even, I still think that a new jury should decide whether or not it is safe to accept the testimony of a witness who went straight from the courtroom to a mental institution, and

the seriousness of whose mental illness was certainly not disclosed, during the trial, to defense counsel. It is unreasonable to charge defense counsel with lack of diligence in discovering the facts as to Janson, facts which were diligently kept from him by those whose duty it was to disclose all pertinent information about a witness, especially in a first degree murder case. It cannot be stressed too much that Janson was the only witness who identified defendant as the killer.

If the jury had been permitted to learn that Janson was at least temporarily insane during the trial, the jury might have had to rely, for a finding of guilt, on Forlenza's testimony as to a dying declaration. That testimony obviously came as a complete surprise to defense counsel at the trial. To say now that the latter should have stopped the trial and made a prompt and thorough investigation, as to the probability or possibility of that declaration ever having been made at all, is to demand the impossible. Even if a long delay in the trial, for such an investigation, could have been had, how could any lawyer, in such a situation, have guessed at the existence of testimony which it has since taken months or years to uncover? How could defense counsel have imagined that elaborate investigations, later made, would turn up two physicians, two nurses, two police officers and several other persons, each prepared to give testimony of greater or less definiteness, completeness and weight, to the effect that the dying declaration could not have been made by decedent or heard by Forlenza? Such testimony is "cumulative" in the broadest sense only of that term, since there was no real opportunity or effort to try out the precise question at the trial. For the same reason, it cannot be said to be merely "contradictory." It is brand new evidence to show that an alleged fact surprisingly testified to (not the fact of guilt but the alleged fact of a dying declaration) simply could not be true. To say that all this new material (or any of it) could with due diligence have been produced at the trial by the defense, is

to ignore reality. How could defense counsel, having no reason to expect dying declaration testimony, have been expected to prepare himself with medical proof that the victim was in fact unable to speak? There simply was no such issue in the case until James Forlenza took the stand. The charge against defense counsel of lack of due diligence is particularly unfounded as to the victim's special nurse Cancro, now a most important witness for defendant, whose very name could not be learned till long after the trial.

The important dispute of fact on a new trial would be as to whether the victim could or did talk. Since at the last trial defense counsel could not have anticipated that any such dispute would arise, diligence in preparing for it is simply not in the picture at all.

This court, since it cannot directly review an order, not in the original judgment roll, denying a motion for a new trial on newly discovered evidence, reaches the same result by ordering a reargument (*People* v. *Regan*, 292 N. Y. 109), as we here. But such a reargument brings up not only the newly discovered evidence, but the whole record, old and new. We cannot, or at least should not, treat the alleged newly-found evidence as something separate and off by itself. We would picture the trial record as it would look with the new testimony added. After thus re-examining the total record, our duty is to say whether or not a new jury, hearing all of it, might well come to a different conclusion.

And our power to order a new trial is not limited by the rules as to newly-discovered evidence. Having heard a reargument of the entire proceedings, we have now the same powers of disposition and decision as in any other appeal in a capital case. Among those is the power to order a new trial if justice so requires (Code Crim. Pro., § 528). I feel strongly that the interests of justice demand a full trial of this cause before a jury which can hear all the witnesses.

The judgment should be reversed and a new trial ordered.

CONWAY, Ch. J., FROESSEL and BURKE, JJ., concur with DYE, J.; FULD, J., dissents in an opinion in which DESMOND and VAN VOORHIS, JJ., concur; DESMOND, J., dissents in a separate opinion in which FULD and VAN VOORHIS, JJ., concur.

Upon reargument: Judgment of conviction affirmed. And upon such reargument there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: The defendant argued that he was deprived of due process of law under the Fourteenth Amendment of the United States Constitution in respect to the exhumation proceedings by the trial court upon the hearing on the application for a new trial. This court held that the defendant's constitutional rights were not violated.

APPENDIX B

Extracts from Record with Regard to Janson

FROM TRIAL TESTIMONY:

Q. I notice a bandage on your head? A. Yes, sir.
Q. When did that happen? A. Armistice Day.
Q. Where did it happen? A. In the Bronx County jail.

By the Court.

Q. How did that happen? A. I ran into some bars.
Q. You mean you ran into some bars and got a scalp wound? A. Yes, sir, I ran right into them.
Q. And they put that plaster on your head, is that it? A. That's it.

By Mr. Fruchtman.

Q. Were you able to see the bars? A. Yes, sir.

Q. Anything wrong with your eye-sight? A. No, sir.

(fols. 326, 327)

* * * * * * *

Q. Do you remember yesterday I asked you how you got that thing on your head? A. I did.

Q. What did you say? A. I said I ran into a wall, into the grill work.

Q. Did you say yesterday that you ran into some bars? A. Correct.

(fol. 480)

Q. Or was it grill work, wall or bars? A. Bars.

Q. So when you just now said it was grill work or wall, you were wrong, is that right? A. I was wrong. It was bars.

Q. What were you—in a cell? A. No.

Q. Did you just walk into them? A. I said I ran into them.

The Court: Tell us how that happened.

Q. Didn't you bang your head against them purposely? A. I did.

(fol. 481)

Q. Did you tell somebody that you blew your top? A. I did.

Q. Have you done that on other occasions? A. No.

Q. Did you ever bang your head? A. No.

Q. Or blow your top? A. I have blown my top many times.

By the Court.

Q. What do you mean by "blowing your top"? A. Well, go off my——

Q. You mean get excited? A. Get excited—you know, blow my top.

(fol. 482)

Q. How did it happen that the mark on your head was brought about? A. I say I ran right into the bars.
Q. Tell us what happened. Why did you do that? A. That I really don't know myself, your Honor.
Q. Did you get angry about something?

Mr. Fruchtman: Now, I object to your Honor's question as being suggestive and leading.
The Court: Objection sustained.

(fol. 483)

Q. You don't know why you did it? A. I don't.
Q. Have you ever been in a mental hospital? A. No.
Q. Ever treated by a psychiatrist? A. No.

(fol. 484)

* * * * * *

From Prison Report, November 11, 1952

5. While waiting for the ambulance I questioned him and he stated that he deliberately ran head on into the rear gate of the tier; that he was depressed and worrying about his sick wife; that he became involved in his present role as a material witness in a murder case and was called to testify; that he was tired of living and wanted to end his life.

(fol. 2019)

* * * * * *

FROM REPORT OF DR. LICHTENSTEIN

November 21, 1952

To Doctor in Charge
Psychiatric Admissions
Bellevue Hospital
New York City

Dear Doctor:

Paul Janson voluntarily comes to your hospital for observation. He states that "it must come sooner or later" He was a material witness for us in a murder case. He h become markedly depressed, has made an attempt at suicid by running his head against a wall; believes that he is a "sex degenerate"; that people know about this; that peopl make wise cracks. He cannot sleep because thoughts of a self-condemnatory nature go through his mind—He blocks, talks slowly is much confused and states that he wants to commit suicide. Will you kindly admit him for observation.

Very truly yours,

P. M. LICHTENSTEIN, M.D.

(fols. 1938-40)

* * * * * * *

FROM BELLEVUE HOSPITAL RECORD
HISTORY: 11/21/52 (why here)

I was a witness on a trial—a man was in a shooting in the Belvedere Bar & Grill—I saw the fellow run out—I saw his face—I was standing at the end of the bar—Its up to me to convict him but I can't be sure of the victim—I mean of the man who done the shooting.

(fol. 1943)

* * * * * * *

FROM PILGRIM STATE HOSPITAL RECORD

He gave the following explanation of why he was sent to Bellevue for observation. "I happened to be a witness

in a shooting affair in a cafe. I didn't see the shooting but turned around right after the shootign was over. I got a glimpse of the man's face that did the shooting. When the case came up in September, I identified the man in court. Afterwards I wasn't sure so that way I rammed my head into the iron bars in the place where I was staying at the Bronx jail. After I hit my head, they were still waiting for me to identify him again to make sure. They tried to calm me down, the D. A. I slept at a hotel. I never got back to the trial. I was dropped at Bellevue for a check-up. I have a feeling, I couldn't explain it, that I could never walk the streets, if it isn't one that would be gathering me it would be someone else. I always imagine somebody is whispering. I always have a suspicion that they despise me. They look and talk at me. I've heard words like I was a fairy or something."

(fols. 1986-1987)

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APPENDIX C

Extract from Affidavit of Patsy Yannotti, Sworn to March 15, 1955

I am sure it was either five o'clock or a few minutes before five when I was in this ward. I saw Evelyn out in the public hall near the entrance to the ward. There was also another young lady there whom I did not know. This other woman was with Evelyn.

We looked at Walter. I spoke right through the oxygen tent and said "How are you Walter." He said nothing but just moved his eyes and it seemed to me that he recognized me. I saw Tony open the zipper of the tent and put his head inside of it and he asked walter "Who did it." When Tony opened the tent the police officer opened the other side; he also put his head inside the tent. Walter's mouth

was all puffed up. I think there was a bandage somewheres around his neck or chin. All Walter did was to make funny noises, but no words came from him. I had seen Walter and Tony together many times in the bar and grill and I knew that they were friends.

We were in the room about ten or fifteen minutes. Outside of saying "How are you Walter" I made no further effort to talk to him, but Tony did try to talk to him a couple of times. I could hear what Tony was saying, but the only thing that came from Walter were mumbled sounds. Certainly he didn't say a single word that could be understood. No one else was at the bedside outside of Tony, myself and the officer. Evelyn was outside in the hall with this other woman. No other man or woman came to the bedside while we were there outside of a woman nurse and then a doctor. She told us that we had to get out of the room; that they were going to take Walter out to the operating room. This was about a quarter past five and I realized that I was late to meet my wife. I ran downstairs into the hall. There was a public telephone there. Tony remained upstairs. I called my wife's place of business, but she had left. I went back upstairs. This took about a minute or two. When I got there Tony was talking to Evelyn and the other woman in the hallway. A little while later I saw Walter being taken out on a roller. A doctor and a nurse were with him.

I remained there until Walter was wheeled onto the elevator which was about 5:30 o'clock P. M. Tony stood around talking to Evelyn for a little while and then Tony and I left the hospital. I drove Tony back to Lizzie's Bar & Grill and I went right home. I knew there was no use going down to 33rd Street to meet my wife so I took the Triborough Bridge home. During the time I was at the hospital no one of Walter's family was there outside of Evelyn and the other woman.

APPENDIX D

Extracts from 1955 Hearing

NURSE CANCRO

Q. Now, from the time that you first got there at ten-o'clock in the morning, at least until the time when you gave him the atropine and started preparing him for the operation, did he utter a single intelligible word? A. As far as I can remember, I hadn't heard him speak.

Q. You hadn't heard him speak. A. No.

Q. During that period. A. During that period.

(S.M. p. 105)

* * * * * *

Q. Now, during the period from 4:30 P. M., to 5:15 P. M., when he was taken to the operating room, did you see any man talking to Walter Forlenza, either outside the operating—or rather, either outside the oxygen tent, or with his head inside the oxygen tent? A. No, sir. The only one I was [sic] was at 1 o'clock.

(S.M. p. 154)

DR. STRULLY

Q. Now, during the time that you were there in connection with the removal from the room, that would be between, about 4:45 to 5:15, did anybody outside of the hospital personnel engage in any conversation with this patient? A. Not to my recollection.

Q. As a matter of fact, was his condition such that you, personally, supervised his removal from the operating room? A. Yes.

Q. Or to the operating room, rather? A. Yes.

Q. And during the course of those preparations, Doctor, did you see anyone, any particular man, come over to the bed and put his head inside the oxygen tent and engage in a conversation with the deceased? A. No.

Q. So that if there was testimony given on this trial that a brother of the deceased at any time between 4:30 o'clock P. M., on February 27th, and up until the time that he was removed from the operating room at 5:15 P. M., engaged in a conversation with the patient, you say that did not occur while you were there?

Mr. Dermody: Objection, your Honor.

The Court: Were you there all the time?

(S.M. p. 200)

The Witness: From about 4:45 to 5:15 when we transported the patient to the operating room.

The Court: All right, objection overruled.

The Witness: Will you state the question again, please?

Q. That did not take place? A. It did not take place.

Q. Doctor, let me ask you this, there was testimony given here by James Forlenza, a brother of the deceased, that between five and five-thirty P. M., on February 27th, he came, or approached, the bedside of his brother, this patient, at which time he said that no one was at the bedside; is that true? A. No, sir, that is not possible.

(S.M. p. 201)

* * * * * *

Q. In your opinion, doctor, based upon his man's condition as you found him to be, both when you first examined him, following the consultation with the other surgeons in the hospital, and your observation of him during the hours of between 4:30 and 5:15 P. M., was this man capable of engaging in this conversation that I have indicated to you? A. Not only was he incapable; it was impossible for him to do so.

(S.M. pp. 203-204)

DR. BREIDENBACH

Q. There has been testimony in this case, doctor, that sometime between five and five-thirty, or at four-thirty in the afternoon of February 27th, that there was a conversation between the patient and the patient's brother, to the effect that the brother asked the patient "How do you feel?" And the patient responded "No good, very bad. I am not going to make it. I am going to die. That is why I sent for you. That is why I sent for you to tell you about what you asked me last night."

And the brother said, "Who shot you?" And the patient said "Nardi." And the brother said, "Nardi who?" And the patient said "Nardi Salemi, the fellow that I introduced you to." And that the patient kept on talking and said "I have five thousand dollars out in the street. See that it is collected."

In your opinion, doctor, could this patient, from your observation of him and your examination of him, have conversed and stated the things that I have read to you at this time? A. I don't believe he could have. I don't think he physically could have done it.

(S. M. p. 297)

Q. Why do you say that, doctor? A. Well, this man was in a markedly weakened condition, he having had a severe injury. He had loss of blood, which put him into moderate shock. He had loss of motor power, some motor power, which is required in speech, and I don't believe he had enough energy, general energy to form words or to put this motor power into activation in order to be able to speak.

(S.M. p. 298)

PATROLMAN SNYDER

Q. Now, officer, you were on duty, were you not, in connection with this patient until certainly from 4:30 up until the time they took him up to the operating room? A. Yes, sir.

Q. Were you not? A. Yes, sir.

Q. Were you the only officer on duty at that time in connection with this patient? A. Yes, sir.

Q. Now, officer, at any time while you were on duty up until the time they took the patient up to the operating room, do you recall any men coming into the room to visit with the patient? A. Not that I recall, no, sir.

(S.M. p. 465)

APPENDIX E

Extract from Coram Nobis Petition (Dec. 6, 1954)

SEVENTH: Substantial questions are involved in this case relative to the defendant's deprivation of constitutional privileges and rights. The law is not so fettered by formalism or so rigid or implacable in its enforcement as to sanction the forfeiture of life because some technicality may not have been observed or some ritualistic language was not employed at a given moment.

We submit that a valid judgment of death within the meaning of the Federal Constitution does not exist here and that at the very least such judgment should not be executed until it has been determined upon the merits that the mandate of the Constitution that no man shall be deprived of life or liberty without due process of law has been observed.

Extract from Notice of Appeal (Feb. 7, 1955)

1. That the dismissal of the defendant's petition dated December 6, 1954, and his supplemental petition dated December 16, 1954, and the reply affidavit verified December 16, 1954 for writ of error *coram nobis* without requiring the respondent to answer and without a hearing

upon the merits of such application, constituted a denial of due process under Article 1, Section 6 of the Constitution of the State of New York, and under the Fourteenth Amendment of the United States Constitution.

Extract from Affidavit of Jacob Shientag, Sworn to March 21, 1955, Used in Support of Motion for New Trial Dated March 21, 1955

The judgment herein is tainted and invalid. A gross fraud has been perpetrated upon the Court. James Forlenza's perjury is such as to deny the defendant every vestige of a fair trial. The defendant has not had his day in Court. He has been denied due process of law guaranteed under the Fourteenth Amendment to the United States Constitution. This Court possesses the inherent power to rectify the judgment herein which has been so fraudulently contrived. The defendant's constitutional right to due process of law can only be satisfied by a hearing in open Court upon the merits so that the perjury and fraud herein charged may be established and the wrong done this defendant remedied.

Extract from Minutes of April 18, 1955

STATEMENT BY DEFENSE COUNSEL

During the course of that autopsy, I find on examining a copy of the proceedings there had, and which I say was furnished to me Friday afternoon by the District Attorney's office, that your Honor participated in the autopsy proceedings in the absence of counsel, and that your Honor asked questions of the representative of the defendant, Doctor Birnkrant, to the extent that I now indicate. On page 2 of this report, at the bottom thereof, I find that your Honor addressed a question to Doctor Birnkrant, as follows:

(S.M. p. 974)

"You have heard the statements made by Dr. Helpern which have been taken down by the stenographer—do you agree with those statements?"

The answer by Dr. Birnkrant: "Yes—I do."

And that referred to all that apparently had been dictated or stated by Dr. Helpern, which preceded the question on page 2 of this report.

I find at the top of page 3 that your Honor stated as follows, in the absence of counsel—and again apparently directing your remarks, or question, to Dr. Birnkrant:

"Dr. Helpern is indicating to Dr. Birnkrant that the track of the bullet hole located below the mandible on the right side does not pass into the bone but extends backward below its level.

"Question, by Judge Goldstein: Is that correct?

"Answer, by Dr. Birnkrant: Yes."

(S.M. p. 975)

There appears to be then some dictation by the Medical Examiner concerning the tongue and larynx of the deceased, which were removed by Dr. Helpern. In connection with that your Honor again addressed Dr. Birnkrant and asked him: "Is that correct?" to which Dr. Birnkrant responded: "Yes, that is correct."

Then appears that statement—I don't know whether it is part of the answer, or not—"And there are no injuries of the larynx."

The Court: No, that clearly was a statement dictated by Dr. Helpern.

Mr. Shientag: I see, well that is true, because that was followed immediately by a question put by the Court: "Is that correct, Dr. Birnkrant?

"By Dr. Birnkrant: Yes."

Apparently the Medical Examiner dictated something concerning the cartilages of the larynx and stated that the cartilages were slightly ossified.

The Court then directed this question to our physician: "Dr. Birnkrant, you are in agreement with the statements that Dr. Helpern is dictating?

"Answer: Yes, I am."

Then there was further dictation, apparently, by Dr. Helpern, concerning the muscles on the right side of the face and the mandible and the jaw and again the Court addressed Dr. Birnkrant: "Are those statements correct?

(S.M. p. 976)

"Dr. Birnkrant: They are."

There was further dictation of a certain finding by Dr. Helpern which is reflected on page 4 of this report, concerning the examination of the skull, and immediately prior to that concerning the condition of the maxilla, or upper jaw, and the Court then addressing Dr. Birnkrant asked: "Are you satisfied with the statements dictated by Dr. Helpern?" to which Dr. Birnkrant responded that he was.

Then the Court summarized the entire proceedings by the following question of page 4, as follows:

"You have heard all the statements that Dr. Helpern has dictated and do you agree they are correct statements?

"By Dr. Birnkrant: I do."

Now, we say that these proceedings, as evidenced by this report thereof, the accuracy of which I have no reason to question, indicates to us that the Court actively participated in this autopsy and took an active role therein, and that the questions put to the doctor for this defendant, and the proceedings had in connection therewith, as evidenced in this report, reflect a very definite partisan and biased attitude of the Court in connection therewith and these proceedings reflect, in our opinion, the utter impossibility of this Court, or of any Court under those circumstances, to render a dispassionate, judicial determination.

(S.M. p. 977)

We feel that the Court has, in effect, or did in effect, rather, make himself a party to this uncalled for, unwarranted, complete new autopsy, three years after death, to determine something that apparently nobody ever disputed, and that by making himself a party, and in taking an active part in the actual proceedings themselves, this defendant under those circumstances has been denied due process of law, that he cannot receive a proper judicial determination, and that his rights, particularly under the 14th Amendment of the United States Constitution have been violated.

(S.M. p. 978)

* * * * * *

Counsel, certainly, were not present at the time that any witness was sworn, or any testimony was taken, nor did counsel participate therein. We deem all of the proceedings had in connection with this exhumation of the body to be violative of due process of law in so far as this defendant is concerned, and more particularly within the meaning and intendment of Amendment 14 of the United States Constitution.

(S.M. p. 982)

Extract from Affidavit of Jacob Shientag, Sworn to May 18, 1955, Used on Motion for Reargument May 18, 1955

Defendant was deprived of a fair trial and due process of law within the intendment of the Fourteenth Amendment to the United States Constitution and is the victim of a tragic miscarriage of justice (p. 9).

Office - Supreme Court, U. S.
FILED
NOV 18 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October 1955 Term

No. 261 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	PAGE
STATEMENT	1
PRIOR PROCEEDINGS	2
The Trial	2
The First Motion for a New Trial	4
The Main Appeal to the Court of Appeals	4
The Motion for Reargument or, in the Alternative, for Amendment of the Remittitur	5
The First Petition to this Court for Certiorari and for Re-Hearing	5
The Application for a Writ of Error *Coram Nobis* and the Appeal From the Denial Thereof	6
The Second Motion for a New Trial	7
A. As to James Forlenza's presence at the hospital	8
(1) The trial testimony on the subject	8
(2) The petitioner's evidence at the new trial hearing	8
(3) The People's evidence	9
B. As to the deceased's ability to speak	11
1. The trial testimony relative thereto	11
2. The petitioner's evidence at the hearing on the motion for a new trial	12

PAGE

3. The People's evidence at the hearing 13

4. The exhumation proceedings 15

5. The People's evidence, continued 17

6. The petitioner's further evidence 17

7. The People's further evidence 18

Evidence Concerning Due Diligence 18

The Decision of the Trial Court 20

The Court of Appeals Decision of Affirmance 20

The Application With Respect to the Remittitur 22

ARGUMENT

The petitioner was not deprived of due process. Moreover, with one exception, no federal questions were raised, presented or passed upon in the state court, which, in any event, based its decision on adequate state grounds 22

CONCLUSION 27

Cases

	PAGE
Buck v. California (1951) 343 U. S. 99	23
Dixon v. Duffy (1952) 344 U. S. 143	23
Edelman v. California (1952) 344 U. S. 357	23
Hammerstein v. Superior Court (1950) 340 U. S. 622	23
Herndon v. Georgia (1934) 295 U. S. 441	22
Lynch v. New York ex rel. Pierson (1934) 293 U. S. 52	23
McCorquodale v. Texas (1908) 211 U. S. 432	22
People v. Eng Hing (1914) 212 N. Y. 373	23
People v. Priori (1900) 164 N. Y. 459	23
People v. Salemi (1954) 306 N. Y. 863	4, 5
People v. Salemi (1955) 308 N. Y. 863	7
People v. Salemi (1955) N. Y. L. J., Apr. 28, 1955, p. 8, col. 4	20
People v. Shilitano (1916) 218 N. Y. 161	24
Salemi v. New York (1954) 348 U. S. 845, reh. den. 348 U. S. 890	4, 6
Smith v. Baldi (1952) 344 U. S. 561	24
Stembridge v. Georgia (1951) 343 U. S. 541	22, 23
Thomas v. Iowa (1907) 209 U. S. 258	22
United States v. Johnson (1945) 327 U. S. 106	24

Other Authorities

Code Crim. Proc., Sec. 465, subd. 7	20, 23

PAGE

3. The People's evidence at the hearing 13

4. The exhumation proceedings 15

5. The People's evidence, continued 17

6. The petitioner's further evidence 17

7. The People's further evidence 18

Evidence Concerning Due Diligence 18

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PAGE

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Edelman v. California (1952) 344 U. S. 357 23

Hammerstein v. Superior Court (1950) 340 U. S. 622 23
Herndon v. Georgia (1934) 295 U. S. 441 22

Lynch v. New York ex rel. Pierson (1934) 293 U. S. 52 23

McCorquodale v. Texas (1908) 211 U. S. 432 22

People v. Eng Hing (1914) 212 N. Y. 373 23
People v. Priori (1900) 164 N. Y. 459 23
People v. Salemi (1954) 306 N. Y. 863 ..... 4, 5
People v. Salemi (1955) 308 N. Y. 863 7
People v. Salemi (1955) N. Y. L. J., Apr. 28, 1955, p. 8, col. 4 20
People v. Shilitano (1916) 218 N. Y. 161 24

Salemi v. New York (1954) 348 U. S. 845, reh. den. 348 U. S. 890 ..... 4, 6
Smith v. Baldi (1952) 344 U. S. 561 24
Stembridge v. Georgia (1951) 343 U. S. 541 ..... 22, 23

Thomas v. Iowa (1907) 209 U. S. 258 22

United States v. Johnson (1945) 327 U. S. 106 24

Other Authorities

Code Crim. Proc., Sec. 465, subd. 7 ..... 20, 23

Supreme Court of the United States

October 1955 Term

No. 261 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

This is a petition for a writ of certiorari to the New York Court of Appeals to review a judgment of that Court, rendered July 8, 1955 [309 N. Y. 208, affirming (1954) 306 N. Y. 863], which, on reargument—to review a denial of a second motion for a new trial—reaffirmed a judgment of the Court of General Sessions, New York County, rendered June 24, 1953, convicting the petitioner of the crime of MURDER IN THE FIRST DEGREE (Penal Law, §1044, subd. 1) and sentencing him to death (R. 4188-9).*

* References "R." are to folios of the printed record on the main appeal, on file in this Court in connection with No. 45 Misc., October 1954 Term.

Prior Proceedings

The Trial

The petitioner was tried on an indictment for Murder in the First Degree which charged that, on or about February 26, 1952, with malice aforethought, he shot one Walter Forlenza with a pistol, causing his death the following day (R. 7-9).

The evidence established that, in the early evening of February 26, 1952, Walter Forlenza was fatally shot by the petitioner as the deceased was sitting in a dining room in the rear of a bar and grill in New York City and County. The petitioner, who had apparently entered the tavern a few minutes before the crime, stood briefly at the bar in front of the establishment and then went back into the dining room to perpetrate the killing. After firing two shots into the deceased's head, he ran back through the bar room and made his escape, remaining unapprehended for about ten weeks.

Proof of the defendant's guilt came, in large part, from two witnesses who were present in the saloon when the crime occurred, each of whom knew the defendant by sight. One of these witnesses was Paul Janson, a patron of the bar for about seven years (R. 295, 297). He testified that, on the day of the shooting, he was standing at the bar drinking beer and watching television when he noticed the petitioner alongside of him (R. 298-301, 304, 351-3, 411-23, 516-8). About five minutes later, he heard two shots from the dining room in the rear and turned to see the petitioner "leaning over a table looking at something" (R. 305-6,

312-3, 353-4). Thereafter, the petitioner, who had been holding a gun, ran the full length of the establishment, passing Janson on the way and pocketing his gun as he left (316-8). Looking back into the dining room again, Janson saw a man (the deceased Forlenza) "topple off" a chair and fall to the floor (R. 318-21). Janson himself then departed and went back to work (R. 321).

The other witness who was present in the bar on the evening of the fatal shooting was a bartender and part owner of the establishment. He testified that he saw the petitioner and Janson standing next to each other at the bar and also observed the deceased seated at a table in the dining room (R. 184-98). A few minutes later, while he was in the kitchen, he heard the shots and entered the dining room and observed the deceased falling from his chair to the floor (R. 199-206). While the testimony of this witness served only to place the petitioner at the scene at the time in question, it attained greater significance in view of the alibi defense offered.

In addition, there was evidence of a dying declaration made by the deceased about three and a half hours before his death, in which he declared that it was the petitioner who had shot him as a result of an argument (R. 682-3, 683-4, 724-6). Finally, testimony was adduced to the effect that ten weeks of police investigation, commencing immediately after the shooting, had failed to locate the defendant (R. 875-84, 894-7, 906, 939-43, 947).

As a defense to the charge, the petitioner advanced an alibi, which rested chiefly upon the testimony of two witnesses who placed him at or near a restaurant in another county at the time of the crime.

The First Motion for a New Trial

Prior to sentence, the petitioner moved for a new trial on the ground of newly-discovered evidence and a full hearing was held. Of the two distinct and unrelated phases of that motion, only one is here involved (Petition, par. 1, pp. 13-15), namely, that the witness Janson was insane and incompetent at the time he testified.*

This motion was denied by the trial judge, and was reviewed in connection with the main appeal to the Court of Appeals from the judgment of conviction.

The Main Appeal to the Court of Appeals

On the main appeal to the Court of Appeals, the petitioner advanced a number of claims, including the alleged insanity and incompetency of the witness Janson at the time he testified. These were alleged merely as errors of law requiring reversal. There was no claim that they constituted a violation of due process under the federal Constitution.

The Court of Appeals affirmed the judgment without opinion, three judges dissenting on the sole ground that the trial judge had failed to marshall the evidence properly under state law [*People* v. *Salemi* (1954) 306 N. Y. 863].

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* This subject was before this Court on an earlier petition for certiorari, which was denied [*Salemi* v. *New York* (1954) 348 U. S. 845, reh. den. 348 U. S. 890].

The Motion for Reargument or, in the Alternative, for Amendment of the Remittitur

The petitioner moved for reargument of the appeal on the ground that all previously argued questions—and some new claims—involved deprivation of due process under the federal Constitution.

In the alternative, the petitioner moved for amendment of the remittitur to recite that such matters had been presented and passed upon as federal questions.

The respondent opposed the first motion on the grounds (1) that the federal questions, having passed unnoticed on the appeal, offered no basis for reargument, and (2) that, in any event, there was no substantial federal question.

The motion to amend the remittitur was opposed on the ground that no federal question had, in fact, been presented or passed upon by the Court of Appeals.

The Court denied both motions [*People* v. *Salemi* (1954) 306 N. Y. 946].

The First Petition to this Court for Certiorari and for Re-Hearing

Thereafter, the petitioner applied to this Court for a writ of certiorari to bring up for review the judgment of the Court of Appeals, alleging all previously asserted claimed errors as violations of due process under the Fourteenth Amendment.

The respondent opposed the petition on the grounds (1) that no federal question had properly or timely been raised, presented or passed upon in the state courts, and (2) that, in any event, no substantial federal question was involved.

This Court denied certiorari and an application for a rehearing on the petition [*Salemi* v. *New York* (1954) 348 U. S. 845, 890].

The Application for a Writ of Error *Coram Nobis* and the Appeal From the Denial Thereof

Subsequent to the action of this Court in connection with the petition for certiorari, the petitioner, in December, 1954, applied to the trial court for a writ of error *coram nobis* to vacate and set aside the judgment. There were two phases to this application.

The first was that, since the respondent had, apparently successfully, opposed the motion for reargument in the Court of Appeals and the petition for certiorari in this Court on the ground that the alleged federal questions had not been properly or timely raised or presented, the petitioner was "candidly and avowedly" now making the application to meet those "objections." The petitioner thereupon asserted that his rights under the federal due process clause had been violated by the prosecution's use of the allegedly insane and incompetent witness Janson.

In the second phase, the petitioner claimed to have some new evidence concerning the dying declaration to the deceased's brother, James, which would show (1) that James was not at the hospital at the time he said the dying

declaration was made, and (2) that, moreover, the declaration could not have been made because the deceased was unable to talk due to his injuries.

The respondent moved to dismiss the application as a matter of law, it appearing on the face of the papers that neither phase thereof fell within the scope of *coram nobis*. Thus, as to the phase concerned with Janson's alleged insanity, since the alleged due process question could have been raised on appeal, *coram nobis* did not lie. As to the phase concerned with the alleged newly-discovered evidence, *coram nobis* also would not lie, the petitioner's appropriate remedy being a motion for a new trial under Section 465, subdivision 7 of the New York Code of Criminal Procedure.

The trial court dismissed the application. On appeal to the Court of Appeals, that Court, two judges dissenting, affirmed the lower court's decision, stating, however, that it was doing so "without prejudice to an application for a new trial in respect to the dying declaration" [*People* v. *Salemi* (1955) 308 N. Y. 863].

The Second Motion for a New Trial

Following the decision of the Court of Appeals, the petitioner moved for a new trial on the ground of alleged newly discovered evidence. As already indicated, the motion had two phases: (1) that James Forlenza was not present at the hospital at the time, according to his trial testimony, that his brother had made the dying declaration; and (2) that, due to his injuries, the deceased had been unable to speak and could not have made the dying declaration.

The People not opposing, a full hearing was ordered and held. Set forth below as briefly as possible are the salient features of the testimony adduced.

A. As to James Forlenza's presence at the hospital

(1) The trial testimony on the subject

At the trial, **James Forlenza** had testified that, as nearly as he could recall, the declaration was made to him between 5:00 and 5:30 p.m., February 27, 1952 (R. 679-80; *cf.* 695-6, 721). On cross-examination, he was confronted with his grand jury testimony, in which he had fixed the time as between 4:00 and 4:30 p.m. (R. 826-8), and with a statement made to an assistant district attorney in May of 1952, in which he set the time as somewhere around 1:00 p.m. (R. 787). He testified, however, that he had no clear recollection of the time the declaration had been made (R. 696).

Also at the trial, **Detective Nilo Mengrone,** called by the defense, testified that he had been at the hospital from about 4:30 to about 4:55 p.m., and that he had not seen James there then (R. 915-7) or at any other time when he, Mengrone, had been present there (R. 925).

(2) The petitioner's evidence at the new trial hearing

Dorothy Cancro, nee Cleghorn, a registered nurse, testified that, from the time of her arrival at 10:00 a.m., February 27, 1952, until the deceased was taken to the operating room, she was "constantly" at the deceased's bedside, except for a half-hour lunch period from 12:30 to 1:00 p.m.

(S. M. 92-93, 96-7, 130).* During that time, she saw only one person—an unidentified man—with his head inside the oxygen tent covering the deceased (S. M. 127, 129-30, 131). That was at 1:00 p.m., on her return from lunch (S. M. 127).

Patsy Yannotti testified that, in company with Tony Iodine [Anthony Donato], he went to the hospital to see Forlenza, arriving a few minutes before 5 o'clock and going to Forlenza's bedside (Yannotti affidavit, pp. 4-5). Apart from hospital personnel, Evelyn Forlenza, an unidentified woman, and a police officer, no other person was present while he was there (*id.*, p. 5).

Dr. Kenneth J. Strully, who attended the deceased at the hospital, testified that he saw the deceased at about 4:45 p.m., and remained with him until he was taken to the operating room (S. M. 199). Not to his recollection, the doctor said, did anyone other than hospital personnel speak to Forlenza during that time (S. M. 200-1).

(3) The People's evidence

Anne Forlenza, sister of the deceased, testified that, as she was leaving the hospital between 4:00 and 4:30 p.m., she saw James Forlenza in the lobby downstairs (S. M. 436-7, 438).

Jeanne Forlenza Bronson, another sister of the deceased, testified that, at about 4:30 p.m., while she and Maud Forlenza were with the deceased, James Forlenza arrived and

* References "S. M." are to pages of the stenographer's minutes of the hearing on the new trial motion.

was left alone with the deceased (S. M. 372-3, 377-8, 379-80, 381, 395, 397, 421). As she left the hospital, she noted, from a clock, that it was "almost a quarter of five" (S. M. 374, 377, 378, 422).

Maud Forlenza, wife of the deceased's brother James, testified that she telephoned her husband a little after 4:00 p.m., and that he arrived at the ward at about 4:15 to 4:30 p.m. (S. M. 511-2, 513, 519-20, 531). She departed for her place of business and her husband returned there about 5 o'clock (S. M. 512-4, 520, 542).

Evelyn M. Calabro—formerly the deceased's mistress, who testified at the trial as a defense witness under the name "Forlenza," and there stated that she did not see James Forlenza at the hospital at any time between 4:00 and 5:30 p.m. (R. 1358, 1370)—testified that she did not see James at any time on February 27th (S. M. 714, 750), but said that she was not at the bedside constantly, being away from time to time for periods of five or ten minutes and sometimes for as much as a half hour (S. M. 556).

Anthony Donato ["Tony Iodine"]—concededly a person with a long criminal record, and a friend of both the deceased and the defendant (S. M. 722-4, 729-30, 745-62, 775, 777-9, 784-92)—testified that, some time after 3:00 p.m., February 27th, he went with Yannotti to see the deceased (S. M. 741, 819, 822). They left for a short while, returned and waited around until the deceased was about to be operated on (S. M. 742-4, 819-20, 848-9). He did not see James Forlenza while he was there (S. M. 827, 829).

Patrolman William J. Snyder, assigned to duty at the deceased's bedside from 4:15 p.m. until after Forlenza's death (S. M. 462, 464, 466-7 471-3), testified that he was not at the bedside constantly and could not recall seeing any man or men there, not even Detective Mengrone (S. M. 462-3, 465, 473-4, 477, 479; *cf.* Mengrone, *supra,* p. 8).

Patrolman Dominick Perrino, on duty at the hospital from 8:00 a.m. to 4:00 p.m., testified that he was not at the bedside at all times, but that he recalled seeing both male and female visitors (S. M. 485-7).

B. As to the deceased's ability to speak

1. The trial testimony relative thereto

Cross-examining the People's first witness, an assistant medical examiner, defense trial counsel questioned him only about whether the deceased's injuries were such that he would have been unable to speak (R. 115-6). The doctor stated that he did not know (R. 115-6).

James Forlenza testified that his brother, the deceased, had told him that "Nardi," the defendant, was the person who shot him (R. 682-3, 724-6), and that, on another occasion, the deceased spoke to him concerning other matters (R. 741-2, 758-9).

Evelyn Forlenza [Calabro], a defense witness, testified that she had spoken to the deceased a number of times in an effort to find out who had shot him, and that he had replied that he did not know and was simply having dinner when it happened (R. 1358-9).

2. The petitioner's evidence at the hearing on the motion for a new trial

Nurse Anita Blanchard, on duty in the ward from the time of the deceased's admission until 7:00 a.m., February 27, 1952, testified that, as far as she remembered, he did not express any intelligible words and made no sounds except groans and moans (S. M. 12-4, 15, 18, 24, 29). She could not say, however, that the deceased was "incapable" of speech (S. M. 14, 15, 29; *cf.* 26-7, 28).

She acknowledged that she had told her superior, Miss Karasik, that she had overheard the deceased ask his wife about their child (S. M. 30-2, 33, 35) but said she was not now sure (S. M. 32, 34, 35).

Patsy Yannotti stated that, when he and Tony Donato visited the hospital on the afternoon of February 27th, the deceased made some noise "but no words came from him" (Yannotti affid. p. 5).

Nurse Cancro testified that, as far as she was able to remember, she did not hear the deceased speak (S. M. 99, 105, 108, 111, 125, 135, 137) although an entry in her notes indicated that, during the afternoon, he was "Complaining" of more pain in his neck (S. M. 107-8, 137-9). She could not say that he did not say anything, but she could not remember that he did (S. M. 139-40, 147). She acknowledged that the deceased was conscious at all times while she was on duty (S. M. 98-9).

Dr. Kenneth J. Strully, who attended the deceased in the hospital, testified that, in his opinion, it was "impos-

ible'' for the deceased to speak or carry on even a short onversation while he was in the hospital (S. M. 203-4). That opinion was based on the following factors relating o Forlenza's condition and injuries: he was in a state of hock; he made no intelligible vocal responses to the wit- ess' inquiries; the right side of the diaphragm was para- yzed; the right lung was collapsed; swelling in the neck ad moved the trachea out of its normal position; several eeth were missing from the front of the mouth due to assage of the bullet; and the lower jaw was fractured on he left side (S. M. 183-8, 193-4, 209, 211, 214-6; compare 16-8, 221-2, 225-30, 230-3, 257, 270-2).

Dr. Lester Briedenbach, Director of Surgery at Beth David Hospital, testified that he had examined the deceased on the afternoon of February 27th (S. M. 283-5), and that, in his opinion, Forlenza could not speak (S. M. 297-8, 310-2). That opinion was based on the following factors: Forlenza was in moderate shock and breathing irregularly; there was a large swelling of the neck; there was, accord- ing to the witness' diagnosis, a fracture of the lower jaw; the tongue and floor of the mouth were swollen; the wit- ness' personal examination of the deceased's mouth, made with a light and tongue depressor, revealed several front teeth missing from both the upper and lower jaws; and the deceased did not speak to the witness (S. M. 285-6, 288, 292-3, 295-6, 304-8, 308-9, 310-2).

3. The People's evidence at the hearing

Mary Ann Karasik, director of nurses at the hospital, testified that Nurse Blanchard had told her that she re- called overhearing Forlenza speak to his wife about their

child (S. M. 327, 333-4, 346-7). Nurse Blanchard omitted mention of this when interviewed by defendant's counsel shortly before the hearing and told him that Forlenza had uttered no intelligible words (S. M. 335, 344). Questioned later by the witness about the omission, Nurse Blanchard said that she was "afraid to become involved" (S. M. 335, 336; compare Blanchard 30-2, 33, 35, 38, 38A).

Jeanne Forlenza Brownson and **Anne Forlenza**, sisters of the deceased, and **Maud Forlenza**, a sister-in-law, testified that the deceased had conversed with them at various times while he was in the hospital (S. M. Jeanne 370-3, 400; Anne 427-8, 429, 453-4; Maud 501, 503-7, 509-12, 514-6, 522-3).

Evelyn M. Calabro—formerly the deceased's mistress who testified at the trial, as a defense witness, to the effect that the deceased had spoken to her but had said that he did not know the identity of his assailant—testified at the hearing that he had conversed with her from time to time about various matters (S. M. 548, 550-4, 558-9, 615-8, 678). Moreover, she recanted her trial testimony that the deceased had said he did not know who shot him, and testified that, in fact, he had finally told her, after much urging on her part, that "Nardi" had done it (S. M. 551-4, 558-9, 616-8, 678).

Anthony Donato testified that, when he visited the hospital on the morning of February 27th, he spoke to the deceased, who told him that "Nardi" had shot him, asked him to warn "Albert to watch out," and said that he did not believe he was going to "make it" (S. M. 730-4, 845). The witness further testified that, at a later time, when

both he and the defendant were in City Prison, the defendant admitted shooting the deceased and explained his reasons for doing so (S. M. 737-8, 801-4, 808).

Patrolmen Snyder and **Perrino** testified that, during the time they were respectively on duty at the hospital, they observed various persons talking to the deceased and saw his lips moving, but were unable to hear any conversation (S. M. Snyder 463-5, 474, 477, 479-81; Perrino 486-8, 491-4, 498-9).

Dr. Benjamin M. Vance, Deputy Chief Medical Examiner, refreshing his recollection from a report of the autopsy, at which he had been present, testified that the deceased's front teeth were intact and that no teeth had been affected by the bullet wounds; neither jaw was fractured, though the upper had been "nicked" on the top at the base of the nose; neither lung was collapsed; and the trachea was undamaged (S. M. 902, 909-10, 917-22, 930-3, 939-40, 949-50). In his opinion, the deceased's injuries—individually or collectively—would not have prevented the deceased from speaking intelligibly "after a fashion" (S. M. 922-3, 932-4, 942-7, 950-1).

4. The exhumation proceedings

At the court's instruction, which met with the express approval of the defense, the deceased's body was ordered exhumed for re-examination, particularly with respect to the condition of the deceased's teeth, in view of the "sharp contradiction of testimony" on that subject (S. M. 923-4). The defense requested and received permission to have a physician of its own choice present at the exhumation and examination (S. M. 924-5).

The exhumation took place on April 14, 1955 (S. M. 952). Present, among others, were the court, defense counsel, the assistant district attorney, Chief Medical Examiner Milton Helpern, M. D., and Dr. Milton Birnkrant, a doctor engaged by the defense (S. M. 952). Each of these —except defense counsel and the prosecutor, who chose to watch the proceedings from a distance (S. M. 986, 986-7, 991; also Petition, Appendix A, p. 23)—were present during the actual physical examination of the body (S. M. 952, 984-5, 986).

Joseph Farenga, an undertaker, sworn by the court, stated that the body exhumed was that of Walter Forlenza (S. M. 954).

Dr. Milton Helpern performed the re-examination of the body, dictating his findings to a stenographer present (S. M. 954). The findings were concurred in, in their entirety, by the doctor engaged by the defense (S. M. 954-62).

Examination of the body revealed the following: all teeth present in the upper jaw were intact and firmly set, the third, or rear, molar on the left side being absent due to a prior extraction (S. M. 955-6); the upper jaw, the maxilla, was intact and unbroken, but grazed or nicked by the passage of a bullet (S. M. 956-7, 961); the teeth present in the lower jaw were regular in alignment and firmly set, all three molars on the left side being absent due to "old extractions" (S. M. 957-8); there was no unusual swelling on the right side of the neck (S. M. 955-9, 961); the mandible, or lower jaw, was not fractured or affected by the bullet wound which passed beneath it

(S. M. 959-60, 961); there were no injuries or obstructions of the pharynx, larynx or trachea (S. M. 960-1).

5. The People's evidence, continued

Dr. Milton Helpern, Chief Medical Examiner, testified concerning his examination of the exhumed body of the deceased, which, in general, was simply repetitious of the findings described above (S. M. 997-1006). He stated that, in his opinion, there was no injury which would have made it impossible for the deceased to have spoken intelligibly prior to his death (S. M. 1006, 1079).

On cross-examination, he stated that, although the autopsy report of Dr. Weinberg had described one of the bullet wounds as having passed through "the floor of the mouth," his personal examination of the exhumed body and probing of the bullet track had revealed that such was not the fact (S. M. 1047-82). He also said that he had found no injuries to the tongue or the muscles controlling it (S. M. 1053-8).

6. The petitioner's further evidence

Mary Forlenza, the deceased's widow, testified that, at different times, Jeanne and Maud Forlenza, and Tony Donato, had told her that the deceased had been unable to talk (S. M. 1102-3, 1106-7, 1113-4).

James R. Clark, a convict, testified that, while in prison shortly after the defendant's conviction, Donato told him, Clark, that he knew that the witness who testified to a "deathbed statement" had lied because the deceased had been unable to speak (S. M. May 10, 1955, pp. 12-4, 21-4, 28-9, 43-5, 47-52).

Mrs. Maria Donato, Tony Donato's mother, testified that he had told her on three separate occasions that the deceased had been unable to talk (S. M. May 10, 1955, pp. 115-8, *cf.*, pp. 119-23, 135, 138-42).

7. The People's further evidence

Tony Donato, recalled, testified that he had never told anyone, including his mother, that the deceased had been unable to speak before he died (S. M. May 10, 1955, pp. 78, 81, 84).

Evidence Concerning Due Diligence

Max Fruchtman, Esq., the defendant's trial counsel, who had signed an affidavit attached to the motion papers, was offered as a witness by the defense (S. M. 156-7). He was questioned by the prosecutor concerning his affidavit, primarily about two statements made therein to the effect that: (1) he had been taken completely by surprise when James Forlenza was called and testified to the dying declaration, due to the fact that the prosecutor had made no mention in his opening of such expected testimony; and (2) under the circumstances, he had acted with due diligence in the investigation into the dying declaration, it being "utterly impossible to do anything about this phase of the matter during the course of the trial and the proceedings thereafter had."

Calling to the witness' attention the fact that, at the trial, he had questioned the medical examiner, the People's first witness, only about whether the deceased's injuries would have prevented him from talking (S. M. 157-60), the prosecutor asked the witness whether, prior to the trial,

he had received information that there would be testimony concerning a dying declaration (S. M. 160). The witness replied that he did not recall receiving any, but that he could not say "definitely" that he had not (S. M. 160). Although his examination of the medical examiner concededly reflected that the witness was interested in finding out whether the deceased was able to talk, the witness still claimed that he was taken completely by surprise by the dying declaration testimony (S. M. 160-1).

On the subject of due diligence, Mr. Fruchtman acknowledged that, during the trial, he had the hospital records in his possession and introduced them in evidence; that the names of Dr. Strully and others appeared in those records; and that he had made no attempt to consult with those persons while the case was being tried (S. M. 162-3). It was conceded that, during the trial, no application was made by Mr. Fruchtman for an adjournment to allow him to consult with anyone at the hospital (S. M. 172-3).

Mr. Fruchtman further testified that he did not speak to Dr. Strully until sometime in December, 1954 (S. M. 163).

Mr. Fruchtman testified that the defense had encountered extreme difficulty in locating Mrs. Canero, whose name did not appear in the hospital records, because the nursing registry files were confidential, and her married name, as finally learned from a State agency not long before the hearing, had been incorrectly spelled (S. M. 175). Mr. Fruchtman acknowledged, however, that no investigation in connection with the dying declaration had been initiated until after the Supreme Court had denied

certiorari on November 22, 1954 (S. M. 176). He said that the matter had been discussed by the defense attorneys "a little while before that time," but nothing had been done about it while the case was pending in the Supreme Court (S. M. 176-8).

The Decision of the Trial Court

The trial court, in denying the motion, held that the petitioner's evidence was not newly discovered within the meaning of the applicable statute (Code Crim. Proc., §465, subd. 7). It went on to decide, however, that that consideration aside, the evidence was not such as would "probably have changed the verdict" [*People* v. *Salemi* (1955) N. Y. L. J., April 28, 1955, p. 8, col. 4; see Petition, Appendix A, pp. 19-26].

The Court of Appeals Decision of Affirmance

The Court of Appeals, in affirming the trial court's decision, likewise held that the alleged newly discovered evidence did not meet the statutory requirements of Section 465, subdivision 7 of the Code of Criminal Procedure as grounds for a new trial, and that the trial judge had not abused his discretion in denying the motion.

Thus, as to that phase of the motion dealing with James Forlenza's presence at the hospital, the Court found that the petitioner's evidence was "at best, * * * cumulative or designed merely to impeach or contradict the former evidence" (309 N. Y. 208, at p. 219), and that, in addition, the evidence—for the most part, at least—could have been produced at the trial with the exercise of due diligence (*id.*, at p. 218).

Similarly, with respect to that phase of the motion concerning the alleged inability of the deceased to speak, the Court pointed out that, since the defense had available in court the hospital records—which named three of the defendant's principal witnesses on the motion—and the autopsy report, the evidence offered on the motion could have, with due diligence, been presented at the trial and was not, therefore, newly discovered (309 N. Y., at pp. 220, 221, 222-223, 226). Having chosen to attack the dying declaration in a different fashion at the trial, the Court added, the evidence offered to support a new theory "served only to impeach and contradict former evidence" which was "not new evidence of the sort warranting the granting of a new trial" (*id.*, at p. 221).

On the motion as a whole, the Court concluded that, as the trial court had found, the evidence adduced "far from 'probably changing the [jury's] verdict' would have made it easier for the jury to conclude that the defendant was guilty" (309 N. Y., at p. 226).

As to the defendant's claim that the trial court's conduct of the exhumation deprived him of due process under the federal Constitution—the only federal question raised in the Court of Appeals—the Court rejected it, holding that the trial court had acted with judicial propriety and that none of the defendant's rights had been violated (309 N. Y., at p. 225).

The three dissenting judges felt that the new evidence was such that it ought to be passed on by a jury.

The Application With Respect to the Remittitur

Upon the affirmance by the Court of Appeals, the petitioner applied to the Court to have its remittitur recite, or to amend its remittitur to recite, that various federal questions involving due process—including those here raised by the petitioner—had been presented and passed upon. The Court declined to do so, except for the issue with respect to the conduct of the exhumation proceedings, the only one in fact raised as violative of due process (309 N. Y., at page 230).

ARGUMENT

The petitioner was not deprived of due process. Moreover, with one exception, no federal questions were raised, presented or passed upon in the state court, which, in any event, based its decision on adequate state grounds [answering the petitioner's brief, pp. 12-18].

As indicated, with one exception, the petitioner's claims of deprivation of due process as federal questions were not presented or passed upon by the Court of Appeals. Moreover, that Court declined to so recite in its remittitur when specifically requested to do so after its affirmance of the judgment and order denying the new trial. Accordingly, this Court will not assume jurisdiction to review the judgment and certiorari will be denied [see *Stembridge* v. *Georgia* (1951) 343 U. S. 541, 546-548; *Herndon* v. *Georgia* (1934) 295 U. S. 441, 443; *McCorquodale* v. *Texas* (1908) 211 U. S. 432, 437; *Thomas* v. *Iowa* (1907) 209 U. S. 258, 262-263].

Even had the federal questions now asserted been properly raised, there would be no basis for certiorari. Mere reading of the Court of Appeals opinion demonstrates beyond question that the judgment rests on adequate grounds under state law and procedure. Under the New York statute (Code Crim. Proc., §465, subd. 7)—not attacked as invalid either in the state court or here—the alleged newly discovered evidence, to warrant a new trial: (1) must not be merely cumulative, impeaching or contradictory of former testimony; (2) must not be such as could have, with due diligence, been produced at the trial; and (3) must be such as would probably have changed the verdict [*People* v. *Eng Hing* (1914) 212 N. Y. 373, 386, 392-393; *People* v. *Priori* (1900) 164 N. Y. 459, 472].

As seen from the majority opinion of the Court of Appeals and that of the trial court, as well as from examination of the testimony taken upon the hearing, the alleged newly discovered evidence failed to meet those requirements (see 309 N. Y., at pp. 215-216). It is therefore apparent that the Court of Appeals did not have to pass on or consider any federal question in arriving at its decision. Where such is the case, this Court has repeatedly said that certiorari will not be granted [*Dixon* v. *Duffy* (1952) 344 U. S. 143, 146; *Edelman* v. *California* (1952) 344 U. S. 357, 358-359; *Buck* v. *California* (1951) 343 U. S. 99, 103; *Stembridge* v. *Georgia* (1951) 343 U. S. 541, 547-548; *Hammerstein* v. *Superior Court* (1950) 340 U. S. 622, 623; *Lynch* v. *New York ex rel. Pierson* (1934) 293 U. S. 52, 54-55].

Moreover, it seems to us, no question of a violation of the federal due process clause could possibly be here involved. The petitioner was afforded the opportunity of a full hearing on his motion for a new trial. Both the trial court and the Court of Appeals considered and reviewed the petitioner's evidence and claims. There has been, then, the "opportunity for reassessment, by * * * State * * * court," of the basis for his application for a new trial [see *Smith* v. *Baldi* (1952) 344 U. S. 561, at page 573 (dissenting opinion by FRANKFURTER, J.), cited in the Petition, p. 14]. The granting or denial of a motion for a new trial is a matter resting within the discretion of the trial court, and, in this case, the Court of Appeals has held that that discretion was not abused. The petitioner was not summarily deprived of something to which he was entitled as a matter of right. Only then could it be said that he has been deprived of all redress and due process (*cf.* Petition, par. 5, pp. 17-18).

The petitioner's real contention seems to be that the trial court and the Court of Appeals made incorrect findings of fact and that he has been deprived of a right to have the evidence heard by a jury. As Judge CARDOZO pointed out in *People* v. *Shilitano* (1916) 218 N. Y. 161, at pages 180-181, where a similar claim was advanced, the judge, not a jury, has that "solemn responsibility" and "duty" under the statute. And this Court has held that it will not review an order denying a motion for a new trial when such review is sought "on the alleged ground that the trial court made erroneous findings of fact," saying that an appellate court should not intervene unless such findings were wholly unsupported by evidence [see *United States* v. *Johnson* (1945) 327 U. S. 106, 111-112]. Plainly

there is ample evidence to support the state courts' finding and, accordingly, there is nothing in this case warranting review by this Court.

With respect to the propriety and conduct of the exhumation proceedings—the only point raised in the Court of Appeals as involving a federal question—it is clear that the petitioner was not deprived of due process thereby.

The petitioner contends (brief, p. 17), however, that he was deprived of due process in three respects: (1) that he was advised that the re-examination of the body was for a limited purpose, whereas it was conducted "on a much broader basis"; (2) that the trial court questioned witnesses during the re-examination; and (3) that petitioner's counsel were not present during the proceedings.

It will be recalled that there was a sharp conflict in the evidence with respect to some of the deceased's injuries, on which the doctors on both sides were basing their respective opinions as to the deceased's ability to speak. After a conference with counsel at the bench, the court ordered the district attorney to arrange for the exhumation of the body, and the defense joined in that being done (923-4). The exhumation proceedings which occurred thereafter have previously been set forth in detail (*supra*, pp. 15-17).

While it is true that, in ordering the exhumation, the court made particular reference to the conflict of evidence concerning the teeth, there was no reason to believe that the examination would be confined to that. In view of the other evidence concerning the injuries to the jaws, the

lungs, the muscles and other processes affecting the power of speech, and so on, or the lack of clear evidence concerning these matters, it was clearly to be expected that the examination would be as complete as the condition of the body permitted. Presumably, Dr. Birnkant—the doctor engaged by the defense—though a radiologist, was a competent physician thoroughly able to make proper medical observations. At least, there is no evidence to the contrary and the defense did not call him to testify. Certainly, the defendant was not deprived of any rights by an examination revealing the actual physical facts.

Nor is there any substance to the defendant's claim in the Court of Appeals that the trial court, during the examination, improperly asked Dr. Birnkant from time to time whether he agreed with the findings being made and dictated by Dr. Helpern. All the court had in mind was to "avoid any possible issue of fact developing" between the two doctors, if that could be done (see Petition, Appendix A, p. 23). The court did not force or coerce Dr. Birnkant in any way to agree with Dr. Helpern's findings, but acted impartially throughout.

With respect to the court's action in placing a witness under oath at the examination, it need only be observed that the witness was a funeral director, who was asked simply whether the body was that of the deceased, Walter Forlenza (954). That, as the Court of Appeals pointed out, was "a most necessary and essential step in the proceeding (309 N. Y., at p. 225).

As for counsel's absence from the receiving chamber where the examination was conducted and being out of earshot during the proceedings, they were where they were by choice, not because of any improper action by the court (see 309 N. Y., at p. 225; also Petition, Appendix A, p. 23).

Conclusion

Certiorari should be denied.

Respectfully submitted,

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November, 1955

NOV 19 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER 1955 TERM

No. 261 Misc.

LEONARDO SALEMI,
Petitioner,

against

THE STATE OF NEW YORK,
Respondent.

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER 1955 TERM

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LEONARDO SALEMI, Petitioner,
against
THE STATE OF NEW YORK, Respondent.

PETITIONER'S REPLY BRIEF

1. In connection with respondent's discussion of diligence (Brief, 18, 19) it is appropriate to note that counsel were no doubt misled by the way in which the hospital records were worded. On their face they indicated that Walter was able to talk (see S. M. 101, 107). It was not until Mrs. Cancro was found that it appeared that these entries were not to be taken literally (see S. M. 102, 107, 137, 147). Surely it was not strange that petitioner's counsel took these records at face value during the trial.

2. Respondent's brief is in error in suggesting (p. 22) that the statement in the record with reference to the federal question arising out of the exhumation proceedings (see Pet. p. 51) resulted from an application by petitioner's counsel after the decision to have the remittitur amended to recite other federal issues as well. The fact of the matter is that the statement in the record was contained in the opinion handed down by the Court and that no formal action was ever taken by the Court on the informal application made by counsel to the clerk.

In any event, we submit that this Court is in no way bound by the state court's having referred to only one issue as presenting a federal question. Here, as we have demonstrated in our petition (p. 12) federal issues of due process were raised in the state courts with respect to both the testimony of Janson and the dying declaration.

The cases cited (p. 22) have no bearing on the situation here presented. In *Thomas* v. *Iowa* (209 U. S. 258) no federal question appeared in the record since there was a reference only to due process and not to the Fourteenth Amendment. In the case at bar the record shows specific references to the due process clause of that Amendment (Pet. p. 12). In *McCorquodale* v. *Texas* (211 U. S. 432) the federal question had not been raised in the state courts until after decision there by the court of last resort. *Herndon* v. *Georgia* (295 U. S. 441) and *Stembridge* v. *Georgia* (343 U. S. 541) are to like effect. Here, at least with regard to the dying declaration, the federal issue was raised as soon as the facts became known. Moreover, in this case, the state court granted an application for rehearing so that it might consider the entire case as though on direct appeal to it (Pet. p. 26). Therefore it had before it the due process contention made by petitioner both in his coram nobis petition (Pet. p. 60) and in the motion for a new trial (Pet. p. 61) a contention also referred to in his reargument motion (Pet. p. 64).

3. Essentially respondent contends that the judgment below rests on an adequate state ground—namely, the view of the majority of the Court of Appeals that the evidence produced by petitioner did not measure up to the requirements of the applicable New York statute (Code Crim. Proc. § 465, subd. 7). But it is the essence of petitioner's contention that no state procedure can bar his right to a new jury trial where the facts are such that a refusal to grant such new trial would so shock the conscience as to amount to a denial of due process. In such a case the

situation is the same as though New York had no statute at all for granting new trials.

This Court has always decided for itself whether a supposed state procedure was really adequate to dispense with the necessity of avoiding decision of the federal issue. And it has not hesitated to look through form into substance. A few instances will suffice.

In *Davis* v. *Wechsler*, 263 U. S. 22, this Court reversed a state judgment on the ground that state procedures could not be so used as to defeat a federal right. In *Lawrence* v. *State Tax Commission*, 286 U. S. 276, this Court brushed aside the contention that an adequate state ground sufficed, finding it unsubstantial. In *First National Bank* v. *Anderson*, 269 U. S. 341, and *Brown* v. *Western R. of Alabama*, 338 U. S. 294, this Court rejected the contention that a state court's interpretation of pleadings disposed of the case on an adequate non-federal ground.

So here, whether or not the new facts cast such doubt on the jury's verdict that due process requires a new trial is a federal question this Court cannot avoid merely because the state court casts its decision in a form that suggests a non-federal ground. That was an evasion by the state court of its responsibility to deal with the federal question, an evasion which does not bind this Court. The basic issue is there and must be faced.

4. Finally (p. 24) respondent argues that there could be no issue of due process here because there was a hearing before Judge Goldstein. If the issue tendered had been one of the knowing use of perjured testimony (as in *Mooney* v. *Holohan*, 294 U. S. 103) or of a fraudulently doctored record on appeal (as in *Chessman* v. *Teets*, decided [illegible] 17, 1955), that argument would be pertinent. For in such situations the essential issue is the prosecutor's knowledge. That is a subject with which the trial jury had no concern, an issue to be determined at the

later hearing. But in the case at bar there was no dispute about the prosecutor's knowledge with respect to the mental condition of Janson.

It is not our contention that the state courts made incorrect findings of fact but rather that they should have made no findings of fact—in the ultimate sense. As soon as the record disclosed the serious question which existed with regard to the mental condition of Janson and the doubt cast on the reliability of the testimony with regard to the dying declaration, due process required the submission of those issues to a jury as part of the whole case, not a separate judicial resolution of them as issues of fact.

5. We wish to call the Court's attention to a case of which we have just learned, namely, *Taborsky* v. *State*, 116 A. 2d 433 (Advance Sheet of September 10, 1955), in which the Supreme Court of Errors of Connecticut reversed an order denying a new trial under circumstances very similar to the case at bar. There, as here, the only witness who identified the defendant became insane after he testified —although in that case the period of time was longer. There, as here, there had been some doubt about the witness' demeanor at the trial. There, as here, there was conflicting medical testimony on the issue whether or not the witness was insane at the time he testified. There, as here, there was considerable delay in bringing on the motion.

Nevertheless, the Connecticut court unanimously held that there should be a new trial. It pointed out (p. 435) that "in a case where human life is at stake, justice as well as humanity requires us to pause and consider before we apply those rules (that is to say, the rules relating to a new trial) in all their vigor".

The Court, moreover, pointed out that it was not the function of the judge passing on a motion for a new trial to resolve the conflicting evidence as to the mental competency of the witness and to determine that as a fact.

The Court said that the only question was the effect which this testimony would have both on the trial court in ruling as to the witness' competency to testify and, if the testimony were allowed, the effect of the new evidence on the jury. The court concluded that such testimony would have a very persuasive effect on a jury.

While the Court recognized that there had not been due diligence in all respects, it noted that the basic fact, namely, the subsequent insanity of the witness, was not known at the time of the trial. These considerations exist here also.

While, of course, this case does not discuss the issues in terms of due process, we submit that the Connecticut court, unlike the New York court, recognized the essential unfairness of permitting a man to go to his death under circumstances such as these and that such unfairness is what the due process clause was intended to protect against.

Respectfully submitted,

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